Supreme Court, U.S.
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No._____

IN THE

# Supreme Court of the United States

October Term, 1997

BOB GLASER,
Petitioner,

v.

CITY OF SAN DIEGO,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Jeffrey S. Schwartz
LAW OFFICE OF
JEFFREY S. SCHWARTZ
501 West Broadway, Suite 1700
San Diego, California 92101
(619) 234-5678

Counsel for Petitioner

224 pp

## TABLE OF CONTENTS

**Page**

TABLE OF CONTENTS ..... App. i

Memorandum Descision, filed March 18, 1998 ..... App. 1

Order Setting Sanctions Amount; Denying Plaintif's Motion to Amend Pursuant to Rule 52 (B); Denying Motion for Reconsideration, filed August 9, 1996 ..... App. 8

Order Granting Defendants' Motions for Rule 11 Sanctions; Seeking Supplemental Briefing, filed May 13, 1996 ..... App. 28

Order Granting With Prejudice Defendants' Motion to Dismiss With Prejudice, filed April 1, 1996 ..... App. 53

Order Granting WIthout Prejudice Defendant's Motion to Dismiss; Granting Plaintiff Leave to Amend, filed January 8, 1996 ... App. 66

Transcript of Motion Hearing, held in San Diego, California, March 25, 1996 ..... App. 75

Transcript of Motion Hearing, held in San Diego, California, January 2, 1996 ..... App. 104

Transcript of Telephone Status Hearing, held in San Diego, California, September 12, 1996 ..... App. 132

Order Extending Time, filed September 16, 1996 ..... App. 151

Order Extending Time, filed May 8, 1998 ..... App. 153

Notice from the United States Court of Appeals to All Parties, dated August 7, 1997 ..... App. 155

**TABLE OF CONTENTS ____ Continued**

Page

Notice from the United States Court of Appeals to All Parties, dated October 20, 1997 ..... App. 157

Oral Argument Calendat of the United States Court of Appeals, dated January 26, 1998 ..... App. 159

Order Submitting Case witout Oral Argument, filed February 24, 1998 ..... App. 165

Complaint for Injunctive Relief, Declatory Relief, Damages, filed October 31, 1995 ..... App. 167

Verification ..... App. 191

First Amended Complaint for Injunctive Relief, Declatory Relief, Damages, filed February 6, 1996 ..... App. 192

Verification ..... App. 221

[SEAL]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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|---|---|
| BOB GLASER, Plaintiff-Appellant, vs. CITY OF SAN DIEGO; WJSIII INC., dba Bill Silva Presents, Defendants-cross-defendants-Appellees, STAFFPRO SERVICES INC., Defendant-cross-claimant-Appellee, SERVICE AMERICA; ACE PARKING INC.; DOES 1 through 100, inclusive, Defedants-Appellees vs. DOES 1 through 20, inclusive, Cross-defendant-Appellee. | No. 97-55476<br>D.C. No. CV-95-03632-MLH<br>(Filed March 18, 1998)<br>MEMORANDUM* |

Appeal from the United States District Court
for the Southern District of California
Marilyn L. Huff, District Judge, Presiding

Submitted March 4, 1998**
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Before: BRUNETTI, THOMPSON, T.G. NELSON, Circuit Judges.

Appellant Bob Glaser appeals the district court's award of Federal Rule of Civil Procedure 11 sanctions to the City of San Diego in Glaser's 42 U.S.C.1983 action. We have jurisdiction pursuant to 28 U.S.C.§1291, and we affirm.

I.

In his complaint, Glaser alleged that his constitutional rights were violated when female patrons entered the men's restroom facility at San Diego Jack Murphy Stadium. The district court dismissed Glaser's complaint without prejudice for failure to state a claim under § 1983. In its dismissal order, the district court cautioned Glaser and his attorney to consider their obligations under Rule 11 prior to filing an amended complaint. Undaunted, Glaser and his attorney chose to file a near-identical amended complaint, which the district court dismissed. The district court then granted sanctions in favor of the City of San Diego in the amount of $2000.[1]

II

The City first argues that the present appeal is untimely because it was filed more than thirty days after entry of the order setting the amount of sanctions. See Fed. R. App. P. 4(a). According to the City, the district court's order of August 12, 1996, setting the sanctions amount, and extending to Glaser the option of dismissing the entire case in exchange for a waiver of sanctions, was a final, appealable order.

Glaser points out, however, that due to a clerical error, he did not receive notice of the entry of the district court's

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[1] The district court also imposed sanctions in the amount of $2000 in favor of a private-party defendant, the Service America Corporation, which sanctions are not presently being challenged.

August 12, 1996 order until September 6, 1996 consequently, on September 16, 1996, the district court issued an order acknowledging its filing error, and extending Glaser's period of time for deciding whether to dismiss his case. Without deciding whether the district court's August 12, 1996 order was a final, appealable order, the September 16, 1996 order was a final, appealable order, which was timely appealed on October 11, 1996.

III.

The district court imposed the sanctions in question upon Glaser and his attorney, jointly, under Rule 11(b) (1), for needlessly increasing the cost of litigation, and upon Glaser's attorney alone, under Rule 11(b) (2), for filing claims with no legal basis.[2]

We review a district court's imposition of sanctions under Rule 11 for an abuse of discretion. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990); Terran v. Kaplan, 109 F.3d 1428, 1434 (9th Cir. 1997).

> "A district court abuses its discretion in imposing sanctions when it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence."

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[2] Monetary sanctions may not be awarded against a represented party for a violation of Rule 11(b) (2). Fed. R. Civ. P. 11(c) (2) (A).

Terran, 109 F.3d 1434.

Federal Rule of Civil Procedure 11 provides, in relevant part, that by presenting to the court a signed pleading or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

Fed. R. Civ. P. 11(b).

IV.

Sanctions are appropriate under Rule 11(b) (2) when a pleading which has been filed is objectively "frivolous, legally unreasonable, or without factual foundation, even though the paper was not filed in subjective bad faith." Zaldivar v. City of Los Angeles, 780 F.2d 823, 831 (9th Cir. 1986). For the reasons set forth in the district court's dismissal order, Glaser's

attorney should have recognized after a "reasonable inquiry" that Glaser's § 1983 claims were not actionable under existing law. Nor were the claims warranted under any "good faith argument for the extension, modification, or reversal of existing law." See Id. at 830-31. Therefore, the district court did not abuse its discretion in imposing sanctions upon Glaser's attorney under Rule 11(b) (2).

V.

The district court also imposed sanctions against Glaser's attorney under Rule 11(b) (1), based on the finding that the first amended complaint was filed, at least in part, for the improper purpose of creating a needless increase in the cost of litigation. Glaser's first amended complaint, like his original complaint, was utterly meritless due to its failure to allege a constitutional violation on the part of the City. Moreover, the first amended complaint was filed in blatant disregard of the district court's admonitions regarding sanctions.

Nevertheless, Glaser argues that the imposition of sanctions under Rule 11(b) (1) was inappropriate because the district court did not make a finding that his suit was filed for an improper purpose. "Improper purpose" is to be tested by an objective standard, and does not require a finding of intentional impropriety. Zaldivar, 780 F.2d at 831 & n.9. Here, the district

court, after finding that Glaser and his attorney needlessly increased the cost of litigation

> "stopped short of deciding that plaintiff's action was filed for an improper purpose as otherwise defined by Fed. R. Civ. P. 11(b) (1)"

(emphasis added) . The clear implication of this statement is that the district court did find that the first amended complaint was filed for the improper purpose of needlessly increasing the cost of the litigation. This finding is not clearly erroneous, and is sufficient to support the imposition of sanctions.

Finally, the district court did not abuse its discretion by holding Glaser jointly liable under Rule 11(b) (1). See Business Guides v. Chromatic Comm., 498 U.S. 533, 548 (1991); Zaldivar, 780 F.2d at 831. Glaser, who is himself an attorney, signed a verification of the first amended complaint. The lack of federal jurisdiction over that complaint should have been apparent. Therefore, sanctions were appropriately imposed upon Glaser.

VI.

Although we rule in its favor, we do not believe that the attorney's fees and costs requested by the City of San Diego pursuant to Fed. R. App. Pro. 38 are appropriate. They are, therefore, denied.

AFFIRMED.

[SEAL]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| BOB GLASER,<br><br>Plaintiff,<br><br>vs.<br><br>CITY OF SAN DIEGO, WJS III, INC. dba BILL SILVA PRESENTS, STAFFPRO SERVICES, INC.; SERVICE AMERICA; ACE PARKING, INC., and DOES 1 through 100, inclusive,<br><br>Defendant. | CASE NO. CV 95-3632 H (AJB)<br><br>(Filed August 9, 1996)<br><br>**ORDER GRANTING SETTING SANCTIONS AMOUNT; DENYING PLAINTIFF'S MOTION TO AMEND PURSUANT TO RULE 52(B); DENYING MOTION FOR RECONSIDERATION** |

Following the dismissal with prejudice of the above-captioned suit, defendants Service America Corporation and the City of San Diego moved the court to impose sanctions against plaintiff, a licensed attorney, and his counsel of record. By Order of the court filed May 13, 1996, the court granted defendants' motions. The court determined that sanctions were appropriate both in light of plaintiff's frivolous filing of an

amended complaint and plaintiff's conduct in needlessly increasing the costs of litigation. The court requested briefing from defendants concerning their expenditures in opposing plaintiff's amended complaint.

The court is now in receipt of the defendants' supplemental briefing, as well as a motion submitted by plaintiff to amend the judgment. Fed. R. Civ. P. 52(b). The court will treat plaintiff's motion as a motion for reconsideration for purposes of review.

Having reviewed the respective briefing, the court sets the total amount of sanctions at $4,000, based on 10 hours of attorney time for the City of San Diego and Service America at $200 per hour. Of this total, plaintiff and his counsel shall each be liable for the payment of $2,000, to the City of San Diego and $2,000 to Service America Corporation under Rule 11(b)(1). Additionally, plaintiff's counsel is is [sic] liable under Rule 11(b)(2). The court denies plaintiff's motion to amend or otherwise alter the judgment entered in the case, and denies a motion for reconsideration.

**INTRODUCTION**

On October 31, 1995, plaintiff filed a complaint in this court, invoking federal jurisdiction on the basis of alleged constitutional violations, as well as statutory civil rights and discrimination infringements. Defendants City of San Diego and WJS III, Inc., dba Bill Silva Presents subsequently moved the court to dismiss the complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6). The court granted without prejudice defendants' motions, granted plaintiff leave to amend, despite the court's warning of its "fail[ure] to see any federal

connection at this stage." January 8, 1996 Order, at 7.

Plaintiff submitted a first amended complaint on February 5, 1996. The amended complaint was similar to the complaint previously dismissed by the court. Again, several of the named defendants moved to dismiss for failure to state a claim. Following a second hearing on March 25, 1996, the court granted defendants' motions to dismiss the action with prejudice. The court stated the reasons for the dismissal in an order dated April 1, 1996. On May 2, 1996, plaintiff filed his notice of appeal of this court's dismissal to the Ninth Circuit.

Defendant Service America Corporation and the City of San Diego moved the court to impose Rule 11 and other sanctions against plaintiff and/or his attorney of record. On May 13, 1996, the court held a hearing on the motions for imposition of sanctions.

After reviewing the parties, papers and entertaining oral argument, the court granted defendants' sanction motions, but limited the award of sanctions to the time from the court's order dismissing the complaint to the hearing on the motion to dismiss the amended complaint. The court imposed Rule 11 sanctions against both plaintiff, an attorney, and his counsel of record for filing a frivolous amended complaint that needlessly increased the cost of the litigation.

The court then directed the parties seeking sanctions to file and serve supplemental documentation of the attorney's fees and costs incurred in defense of the amended complaint in the period ranging from January 8, 1996 -- the date of the court's Order dismissing plaintiff's original complaint -- up to and including March 25, 1996 -- the date of the second hearing

on defendants' renewed motions to dismiss. Upon receipt of the papers, the court stated that it decide what amount of sanctions would be appropriate.

## FACTUAL BACKGROUND

On March 22, 1995, plaintiff attended a concert at the Jack Murphy Stadium in San Diego featuring the singers Elton John and Billy Joel. During several trips to the men's restroom, plaintiff encountered female concert-goers at the unpartitioned urinal, which plaintiff terms a trough. Plaintiff filed a complaint for injunctive relief, declaratory relief, and damages, arising from his resulting inability to "enjoy the concert and... perform his necessary bodily functions without unnecessary difficulty." (Pl.'s Compl. 1 96). Plaintiff charged various named and unnamed "Doe" defendants with offenses to his federal and state rights.

Plaintiff claimed that he had suffered a breach of his civil rights pursuant to 42 U.S.C. § 1983, discrimination pursuant to 42 U.S.C. § 2000(a), and violation of the Fourteenth Amendment's assurances of personal security and privacy. (Pl.s' Compl. ¶¶ 66, 67, 69, 72).

Plaintiff's complaint named defendants the City of San Diego ("City"), the owner and operator of the Stadium, WJS III, Inc. dba Bill Silva Presents, the concert promoter, Staffpro Services, Inc., the provider of private security on the night of the concert, Service America Corporation ("SAC"), the food and beverage concessionaire, and Ace Parking, Inc., the provider of parking facilities that night. On December 12, 1995, plaintiff voluntarily dismissed defendant Ace Parking, Inc. from the action.

Following a court hearing on January 2, 1996, this court dismissed plaintiff *I*s original complaint. The court determined that under the law and the facts as alleged, plaintiff failed to state a claim under 42 U.S.C. § 1983, which requires that the challenged conduct arise from "state action." National College Athletic Association v. Tarkanian, 488 U.S. 179, 191 (1988); Wyatt v. Cole, 504 U.S. 158, 161 (1992). The court also found plaintiff's discrimination claim defective.

The court held that plaintiff failed to state a claim under the Fourteenth Amendment. The court discussed relevant case law and concluded that there is no constitutional right of privacy regarding activities exposed to public view. Katz v. United States, 389 U.S. 347 (1967). Two requirements are necessary for a plaintiff to have a legitimate expectation of privacy: first, a person must have a subjective expectation of privacy; second, the expectation must be one that society recognizes as reasonable. at 361. Finally, the court addressed the deficiencies in plaintiff's Fourteenth Amendment "personal security" claim. The Due Process Clause of that amendment provides that a "state" shall not "deprive any person of life, liberty, or property, without due process of law." Under the clear precedent of DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), the Fourteenth Amendment exists "to protect the people from the State, not to ensure that the State projects] them from each other."

The court order, explicitly referenced Rule 11 and cautioned plaintiff and his counsel to carefully examine the legal merit of any claims submitted to this court." 1/8/96 Order, at 7. The court also provided plaintiff with "the option of

abandoning his federal claims and electing to sue in state court." Id. at 8.

Plaintiff responded by submitting a first amended complaint that was similar to plaintiff's original complaint. Plaintiff's concession to the court's dismissal of his federal claims was to delete from his complaint one cause of action for discrimination in a place of public accommodation. 42 U.S.C. § 2000(a). He also attempted to add a claim of deliberate indifference to his serious medical needs, a claim the court found to be frivolous.

In its Order of January 8, 1996, the court "strongly encouraged plaintiff to examine the options as they apply to all named defendants, not simply defendant City of San Diego." 1/8/96 Order, at 8. However, plaintiff persisted in naming the concert promoter and the concert concessionaire, respectively, as defendants in his amended complaint. Plaintiff suggested that federal liability attached to defendant Bill Silva because the defendant "knew the requirements that needed to exist to obtain the permit to promote the concert." (Pl.'s 2d Mem. of P. & A. in Opp'n at 13). Plaintiff also implied that defendant SAC, the food concessionaire, maintained control over the restroom facilities at the Stadium or the concert-goers who entered the restrooms. (Pl.'s Am. Compl. 9, 12, 23).

Once again, the premise for plaintiff's federal suit was the presentation of a federal question. 28 U.S.C. § 1331. Several defendants challenged the sufficiency of plaintiff's amended complaint. The court granted their motion to dismiss with prejudice the action in its entirety for a failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12

(b) (6) . Defendants City of San Diego and SAC moved the court for sanctions, maintaining that plaintiff's complaints were frivolous and filed for an improper purpose in violation of Rule 11.

## DISCUSSION

Federal Rule of Civil Procedure 11 permits a court to impose sanctions upon a plaintiff and/or his counsel for engaging in certain offenses. In pertinent part, the Rule provides:

> (b) Representations to Court.
>
> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery...

In the event that a court determines that Rule 11 has been violated, the court has the discretion to impose an appropriate sanction upon the attorneys, law firms, or other parties who have engaged in the prohibited behavior. Fed. R. Civ. P. 11(c).

Deterrence is the touchstone for the imposition of Rule 11 sanctions. The purpose of the Rule has never been to chill vigorous advocacy, but rather to 11 reduce the burden on district courts by sanctioning and hence, deterring, [parties] who submit motions or pleadings which cannot reasonably be supported in law or fact." Golden Eagle Distribution Corporation v Burroughs Corporation, 801 F.2d 1531, 1542 (9th Cir. 1986).

Case law provides an overlay for Rule 11 interpretation. A court may impose sanctions if a party either files a paper for an improper purpose or files a "frivolous" paper. Zaldivar v. City of Los Angeles, 780 F.2d 823, 832 (9th Cir. 1986). The question of a pleading's "improper purpose" is distinct from the question of its "frivolousness." A finding of both "frivolousness" and "improper purpose" will factor into the total amount of sanctions assessed against the offender.

Defendants City of San Diego and Service America urge the court to make a determination that plaintiff's complaints were filed "for any improper purpose, such as to harass" a defendant and that plaintiff filed "frivolous" pleadings. Zaldivar, 780 F.2d at 832

> ("Without question, successive complaints based upon propositions of law previously rejected may constitute harassment under Rule

11" ).

The City and SAC argue that Rule 11 sanctions should follow from the filing of plaintiff's original complaint as well as his first amended complaint. (Def. City's Mem. of P. & A. in Supp. at 2-3; Def. SAC's Not. of Mot. and Mot. for Sanctions at 2).

Both defendant City and defendant SAC attempted to have plaintiff withdraw the complaint prior to filing their sanction motions. The court concludes that defendants, actions were in compliance with the "safe harbor" provision of Fed. R. Civ. P. 11(c)(1).

On December 1, 1995, defendant City served plaintiff's counsel with a sample Rule 11 motion describing the conduct that subjected plaintiff to the possibility of sanctions. On February 13, 1996, defendant City wrote plaintiff's counsel to extend an opportunity to withdraw the first amended complaint. (Def. City's Mem. of P. & A. in Supp. of Sanctions Mot., Exs. A & B).

Service America also contacted plaintiff regarding the basis of the litigation pending against SAC. On or about January 2, 1996, counsel for Service America called plaintiff's counsel to clarify the basis on which plaintiff was alleging SAC liability. Counsel responded, "[Service America] sold him the beer."[1] (Fiacco Decl. 2) In the course of opposing

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[1] Among the factual allegations presented in plaintiff's original complaint was that plaintiff purchased and consumed beer following his first distressful bathroom encounter, thus necessitating several additional trips to the bathroom. (Pl.'s Compl. 11 20, 28, 34, 36).

plaintiff's amended complaint, Service America described how plaintiff's pleadings qualified for the imposition of Rule 11 sanctions, thus putting plaintiff on notice. (Def. SAC's Mem. of P. & A. in Supp. of Mot. to Dismiss Am. Compl. 2). On approximately March 11, 1996, Service America also discussed the prospect of a voluntary dismissal with counsel for plaintiff (Fiacco Decl ¶ 3). Counsel for plaintiff refused to remove the concert concessionaire from the list of defendants charged with constitutional and statutory violations in the amended complaint.

In addition to the notice provided by the defendants, plaintiff was warned about sanctions by the court. In dismissing plaintiff's original complaint, the court emphasized the liberal standards governing amendment of deficient pleadings. Fed. R. Civ. P. 15(a). The court granted plaintiff thirty days, leave to amend in an opinion that contained cautionary language. The court's dismissal order of January 8, 1996 recited several of the provisions of Rule 11. The Order further cautioned plaintiff and his counsel "to carefully examine the legal merit of any claims submitted to this court." 1/8/96 Order, at 7.

The court explained how the essential element of "state action" was missing from plaintiff's claims as to SAC and the concert promoter, and "strongly encouraged plaintiff to examine the options as they apply to all named defendants." Id. at 8. Finally, the court provided plaintiff with "the option of abandoning his federal claims and electing to sue in state." Id. Plaintiff nonetheless proceeded to file an amended complaint that echoed the original complaint in its deficiencies and its

naming of defendants.[2]

The court concludes that plaintiff and his counsel have engaged in sanctionable conduct. In response, the court and the moving parties heeded Ninth Circuit authority by bringing the sanctionable behavior to the immediate attention of the offending parties. Plaintiff was put on clear and fair notice of possible liability at the time of the issuance of the court's first Order dismissing the complaint for failure to state a claim. The allegations of constitutional and statutory violations in plaintiff's original complaint may be excusable, albeit strained. See Greenburg v. Sala, 822 F.2d 882, 887 (9th Cir. 1987) (reminding the court that Rule 11 is not meant "to chill an attorney's enthusiasm or creativity") However, the near-identical allegations of constitutional and statutory violations in plaintiff's amended complaint are unsupported by the facts of the case or the relevant law.

The court sees patent frivolousness in plaintiff's amended complaint, especially given the court's admonition about Rule 11. Therefore, sanctions are appropriate under the circumstances presented by this case.

This court assesses Rule 11 sanctions against plaintiff's counsel for the filing of plaintiff's "frivolous" amended complaint. Fed. R. Civ. P. 11 (b) (2). The court need not find, in addition, that subjective bad faith motivated the filing. A "frivolous" suit "denote[s] a filing that is both baseless and made without a reasonable and competent inquiry." Townsend v. Holman Consulting Corporation, 929 F.2d 1358, 1362 (9th

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2 Plaintiff has also filed suit in state court.

Cir. 1990). An objective legal standard applies to determinations of frivolousness. Riverside Savings Bank v. National Mortgage Equity Corp., 893 F.2d 1109 (9th Cir. 1990).

Using an objective test, plaintiff's counsel is liable for the frivolous pleadings under Rule 11. The Ninth Circuit supports the imposition of sanctions for

> "[a] paper filed in district court and signed by an attorney or an unrepresented party [which] is frivolous, legally unreasonable, or without factual foundation, even though the paper was not filed in subjective bad faith."

Zaldivar, 780 F.2d at 831. A party with arguable meritorious claims may not pepper his complaint with frivolous claims and then hold the meritorious claims as a shield against the imposition of sanctions. Cross & Cross Properties v. Everett Allied Co., 886 F.2d 497, 505 (2d Cir. 1989). An attorney "should not be able to proceed with impunity in real or feigned ignorance of authorities which render his argument meritless." Golden Eagle Distributing, 801 F.2d at 1536.

Plaintiff, Bob Glaser, an attorney, is also liable with his counsel under Rule 11(b) (1) for creating a "needless increase in the cost of litigation." Fed. R. Civ. P. 11(b)(1). Business Guides Inc. v. Chromatic Communications Enterprises. Inc., 498 U.S. 533, 550 (1991) (holding that represented clients may be competent to make the necessary pre-filing inquiry, given that "party litigants may have a great deal of litigation experience"). Similarly, the court is not persuaded that plaintiff acted reasonably in filing plaintiff's amended complaint under

the facts and the law applicable to the claims. Orange Production Credit v. Frontline Ventures, Ltd., 792 F.2d 797 (9th Cir. 1986) (affirming Rule 11 sanctions against a party who filed a complaint in federal district court when that party should have known that the complaint lacked a factual foundation for federal subject matter jurisdiction).

The court notes that 11[elxtended research alone will not save a claim that is without legal or factual merit from the penalty of sanctions." Zaldivar, 780 F. 2d at 831. The present case is lacking both in legal and factual merit.

The court questions counsels selection of a concert concessionaire and a concert promoter, among others, as defendants in the amended complaint when the federal jurisdiction was based upon claims requiring state action. The information reasonably available to counsel at the time of the filing of the first amended complaint should have put counsel on firm notice that defendant SAC and the concert promoter were not state actors subject to liability in a federal court. Zaldivar, 780 F.2d at 831 (holding that standard of reasonable knowledge is an objective one).

In the case of Gaskell v. Weir, 10 F.3d 626 (9th Cir. 1993), the Ninth Circuit upheld the lower court's assessment of sanctions against a party who filed a § 1983 claim in a factual context in which state action was absent. The appellate court observed:

> In imposing sanctions against Canatella for a frivolous complaint, the district court determined that the allegations of state action in support of the section 1983 claim were so baseless that the complaint was frivolous.

> We agree. "[W]hen private parties make use of state procedures with the overt, *significant assistance* of state officials, state action may be found." [Citations omitted]. In performing the ministerial act of accepting and filing the settlement documents, the court clerk, S.L. Weir, did not provide "significant assistance" to the alleged conspiracy. To hold otherwise would import "state action" into private acts where a state actor plays nothing more than a ministerial role. The complaint was patently frivolous.

Id. at 628. The court reaches the same conclusion in the present case.

In his opposition papers, plaintiff suggests for the first time that plaintiff was "making a reasonable argument for an extension of existing law" when he insisted that the named defendants were culpable of privacy violation. (Pl.'s Opp'n at 910) . The court observes that in past pleadings and arguments before the court, plaintiff maintained that the constitutional right to privacy, as understood by existing case law, encompassed plaintiff's situation. (Pl.'s Mem. of P. & A. in opp'n to Dismissal of Am. Compl. at 7). In support of plaintiff's first amended complaint, plaintiff declared that he had both a subjective expectation of privacy and a societally-reasonable expectation of privacy, as required under the test enunciated in Katz v. United States, 389 U.S. 347 (1967).

The court has considered and rejected plaintiff's new arguments. While this court does not intend to dissuade attorneys from pursuing hard-fought, energetic and zealous representation, the near-replica of the original complaint and

previous briefing in support of the amended complaint created an unwarranted expense to the litigants under Fed. R. Civ. P. 11 (b)(1).

The court stops short of deciding that plaintiff's action was filed for an "improper purpose" as otherwise defined by Fed. R. Civ. P. 11 (b)(1). There are indications that plaintiff appeared on radio and television programs and was a political adversary of the City. (Def. City's Mem. of P. & A. in Supp. of Sanctions Mot. at 9). However, the court declines to speculate on plaintiff's motives in bringing the litigation. Because the court does not reach the issue of bad faith, the court denies the City's request for sanctions under 28 U.S.C. § 1927. That section provides:

> Any attorney... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct.

Imposition of sanctions under this section requires a finding that the attorney acted recklessly or in bad faith. U.S. v. Associated Convalescent Enterprises, Inc., 766 F.2d 1342, 1346 (9th Cir. 1985). Mere negligent conduct is not sufficient. MGIC Indemnity Corp., v. Moore, 952 F.2d 1120, 1122 (9th Cir. 1991). Since the court finds the sanctions under Rule 11 to be a sufficient deterrent, the court declines to impose sanctions under 28 U.S.C. 1927.

The persistence of plaintiff's frivolous claims had an appreciable effect on the expenses and costs of the litigation. Defendants City and Service America Corporation, not to

mention the other named defendants, devoted significant resources in defending against a meritless suit not once, but twice. The court aims to deter the repetition of the sanctionable conduct. Fed. R. Civ. P. 11(c)(2).

Having described the sanctionable conduct and explained the basis for the imposition of sanctions in its previous order of May 13, 1996 and on reconsideration in ths [sic] order, the court finds that the sole remaining issue is the proper amount of sanctions. Fed. R. Civ. P. 11 (c) (3). The court requested that the parties submit declarations and supporting documents that further quantified the expenses incurred in connection with the case. Both the amount of the sanctions and the manner in which they are imposed should be consistent with the purpose and directive of the authority on which sanctions are based.

The court cautioned that it would only consider claims for costs arising from the date of January 8, 1996 -- when the court issued its Order granting without prejudice defendants' motion to dismiss and granting plaintiff leave to amend -- through and including March 25, 1996, when the court held its hearing on the dismissal of plaintiff's first amended complaint. The court asked the parties to narrow their sanctions request to the timeframe in which plaintiff might have refrained from filing or withdrawn the offending amended complaint. The court is now in receipt of defendants, supplemental briefing and of plaintiff's motion to amend the judgment granting sanctions.

**RESOLUTION**

The court awards monetary sanctions to the City and to SAC. The court imposes sanctions strictly as a deterrent

measure, and not as a means of providing full recovery of the costs of litigation. The court has examined the billing records of counsel for the defendants and considered the costs that the attorneys incurred on the case in the period between January 8, 1996 -- the date of the court's Order dismissing plaintiff's original complaint -- up to and including March 25, 1996 -- the date of the second hearing on defendants, renewed motions to dismiss. The court has purposefully excluded any and all fees associated with the sanctions request.

Rule 11 authorizes a court to direct payment "*of some or all* of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Fed. R.C.V. v. P. 11(c)(2) (emphasis added). Danvers v. Danvers, 99 F.2d 601, 605 (6th Cir. 1992)

> ("[b]ecause deterrence is the primary goal, the minimum necessary to deter the sanctioned party is the proper award, even if this amount does not fully compensate the moving party").

The court will therefore award limited fees in an amount sufficient to deter repetition of plaintiff's sanctionable conduct. The court will reimburse each party at a billable rate of $200 per hour[3], for a ten hour period. Although this amount represents less than the time spent and the award sought, the court finds a total award of $4,000 appropriate.

The court also extends to plaintiff the deterrent option of dismissing the case in its entirety within 30 days. "One of

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[3] The court has averaged the different hourly rates for the SAC attorneys at approximately $200 an hour.

the purposes of sanctions is to encourage attorneys to be reflective about the issues they present for review." International Union of Bricklayers, etc. v. Martin Jaska, Inc., 752 F.2d 1401,1406 (9th Cir. 1985). The court will waive the sanctions if plaintiff elects to file the appropriate documents to result in a dismissal of the case with prejudice within the next thirty (30) days.

The court finds that plaintiff. an attorney, and his counsel are jointly responsible under Rule 11(b)(I) for the actions that subjected the parties to sanctions. Plaintiff's counsel is also responsible under Rule 11(b)(2). Business Guides, Inc., 498 U.S. at 932, ("Quite often it is the client, not the attorney, who is better positioned to investigate the facts supporting a paper or pleading"). Accordingly, the court holds plaintiff and his counsel equally liable for sanctions in the sum of $4,000. Of this total award, $2,000 shall issue to the City of San Diego and $2,000 to the Service America Corporation.

**PLAINTIFF'S MOTION TO AMEND**

The court denies plaintiff's motion to amend the judgment, submitted under Fed. R. Civ. P. 52 (b) Plaintiff contests the court's Order of May 13, 1996 granting defendants' motion for Rule 11 sanctions. In relevant part, Rule 52 (b) of the Federal Rules of Civil Procedure provides:

> On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings -- or make additional findings -- and may amend the judgment accordingly.

In the present case, the court has yet to enter a judgment on the sanctions request. Plaintiff's motion is untimely, as the court

made no monetary award of sanctions in its Order of May 13, 1996.[4]

Plaintiff's motion to amend is therefore denied.

The court will treat plaintiff's motion as a motion for reconsideration, and will examine the motion under these standards as well. A district court may reconsider a dispositive order under either Fed. R. Civ. P. 59(e) (motion to alter or amend a judgment) or Fed. R. Civ. P. 60 (b) (relief from judgment) Reconsideration is appropriate

> "if the district court:
>
> (1) is presented with newly discovered evidence,
>
> (2) committed clear error or the initial decision was manifestly unjust, or
>
> (3) if there is an intervening change in the controlling law."

School Dist. No. 1J, Multnomah County, Oregon v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993), cert. denied, __ U.S. __, 114 S.Ct. 2742 (1994).

In the motion, plaintiff outlines similar arguments

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[4] Irrespective of the timing of plaintiff's motion the court notes that plaintiff's 52(b) motion is deficient on the merits. Plaintiff fails to produce evidence that the judgment, if entered, was erroneous or otherwise constituted a manifest error of fact or law, thus warranting amendment. Diebitz v. Arreola, 834 F. Supp. 298, 302 (E.D. Wis. 1993) (adding that a Rule 52(b) motion "is not intended to allow the parties to relitigate old issues, to advance new theories, or to rehear the merits of a case") . Plaintiff Is dissatisfaction with the outcome of his litigation neither converts the court's decision into legal error, nor infects the ruling with the high degree of error necessary to support a motion under Rule 52(b).

presented to the court resulting in the May 13, *1996* order. Barber v. Hawaii, 42 F.3d 1185, 1198 (9th Cir. 1994) (reviewing the denial of a motion for reconsideration for abuse of discretion). Plaintiff neglects to provide the court with new evidence or new law. A motion for reconsideration is not intended to provide litigants with a "second bite at the apple." Whether treated as a motion to amend the judgment or a motion for reconsideration, plaintiff's motion fails.

## CONCLUSION

This court has never issued monetary sanctions before this case. However, having reviewed the parties' respective briefing and the financial documentation of defendants, the court imposes monetary sanctions in the amount of $4,000 for needlessly increasing the costs of litigation and for a frivolous amended complaint. Of this total, plaintiff and his counsel shall each be liable for a payment of $2,000 to the City of San Diego and a payment of $2,000 to the Service America Corporation. The court denies plaintiff's motion to amend or otherwise alter the judgment entered in the case and denies the motion for reconsideration.

IT IS SO ORDERED.

DATED: 8/8/96

s/ Marilyn L. Huff
MARILYN L. HUFF, JUDGE
UNITED STATES DISTRICT COURT

[SEAL]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| BOB GLASER,<br><br>Plaintiff,<br><br>vs.<br><br>CITY OF SAN DIEGO, WJS III, INC. dba BILL SILVA PRESENTS, STAFFPRO SERVICES, INC.; SERVICE AMERICA; ACE PARKING, INC., and DOES 1 through 100, inclusive,<br><br>Defendant. | CASE NO.<br>CV 95-3632 H (AJB)<br><br>(Filed<br>May 13, 1996)<br><br>**ORDER GRANTING DEFENDANTS' MOTIONS FOR RULE 11 SANCTIONS; SEEKING SUPPLEMENTAL BRIEFING** |

On October 31, 1995, plaintiff filed a complaint in this court, invoking federal jurisdiction on the basis of alleged constitutional violations, as well as statutory civil rights and discrimination infringements. Several of the named defendants subsequently moved the court to dismiss the complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6). The court granted without prejudice defendants' motions, and in a carefully-worded opinion granted plaintiff leave to amend despite the court's conceded "failure to see any federal connection at this stage." January 8, 1996 Order, at 7.

Plaintiff submitted a first amended complaint on February 5, 1996. The amended complaint was notable for its similarity to the complaint previously dismissed by the court. Again, several of the named defendants moved to dismiss for failure to state a claim. Following a second hearing on March 25, 1996, the court granted defendants, motions to dismiss the action with prejudice. The court clarified the reasons for the dismissal in an Order dating from April 1, 1996. On May 2, 1996, plaintiff filed his notice of appeal of this court's dismissal to the Ninth Circuit.

Defendant Service America Corporation and the City of San Diego now move the court to impose Rule 11 sanctions against plaintiff and/or his attorney of record. The City of San Diego additionally requests that the court impose sanctions against plaintiff's counsel, pursuant to 28 U.S.C. § 1927, for unreasonably and vexatiously multiplying the proceedings. On May 13, 1996, at 10:30 a.m., the court held a hearing on the motions for imposition of Rule 11 and other sanctions.

After reviewing the parties, papers and entertaining oral argument, the court grants defendants' sanction motions. The court imposes Rule 11 sanctions against both plaintiff, an attorney, and his counsel of record for the filing of a frivolous amended complaint that needlessly increased the cost of the litigation. The total amount of Rule 11 sanctions has yet to be determined. The court declines to impose sanctions pursuant to 28 U.S.C. § 1927.

The court directs the parties seeking sanctions to file and serve supplemental documentation tallying the costs incurred in defense of the amended complaint. The court requests briefing on attorneys' fees and costs expended in the period ranging

from January 8, 1996 -- the date of the court's order dismissing plaintiff's original complaint -- up to and including March 25, 1996 -- the date of the second hearing on defendants, renewed motions to dismiss. Briefing will be due with the court no later than two weeks from the date of this signed Order. The court will then review the parties' papers and make a determination of the total sanctions.

## FACTUAL BACKGROUND

On March 22, 1995, plaintiff attended a concert at the Jack Murphy Stadium in San Diego featuring the singers Elton John and Billy Joel. During several trips to the men's restroom, plaintiff encountered female concert-goers at the unpartitioned urinal. Plaintiff filed a complaint for injunctive relief, declaratory relief, and damages, arising from his resulting inability to "enjoy the concert and... perform his necessary bodily functions without unnecessary difficulty." (Pl.'s Compl. ¶ 96). Plaintiff charged various named and unnamed "Doe" defendants with offenses to his federal and state rights.

Plaintiff claimed that he had suffered a breach of his civil rights pursuant to 42 U.S.C. § 1983, discrimination

pursuant to 42 U.S.C. § 2000(a), and violation of the Fourteenth Amendment's assurances of personal security and privacy. (Pl.s' Compl. ¶¶ 66, 67, 69, 72).

Plaintiff's complaint named defendants the City of San Diego ("City"), the owner and operator of the Stadium, WJS III, Inc. dba Bill Silva Presents, the concert promoter, Staffpro Services, Inc., the provider of private security on the night of the concert, Service America Corporation ("SAC"), the food and beverage concessionaire, and Ace Parking, Inc., the provider of parking facilities that night. On December 12, 1995, plaintiff voluntarily dismissed defendant Ace Parking, Inc. from the action.

Following a court hearing on January 2, 1996, this court dismissed plaintiff's original complaint and granted plaintiff leave to amend to state a federal cause of action. The court determined that under the law and the facts as alleged, plaintiff failed to state a claim under 42 U.S.C. § 1983, which requires that the challenged conduct arise from "state action." See National College Athletic Association v. Tarkanian, 488 U.S. 179, 191 (1988); Wyatt v. Cole, 504 U.S. 158, 161 (1992). The

court also found plaintiff's discrimination claim defective.

Plaintiff's constitutional claims met a similar fate. The court held that plaintiff failed to state a claim under the Fourteenth Amendment. The court discussed relevant case law and concluded that there is no constitutional right of privacy regarding activities exposed to public view. Katz v. United States, 389 U.S. 347 (1967). Two requirements are necessary for a plaintiff to have a legitimate expectation of privacy: first, a person must have a subjective expectation of privacy; second, the expectation must be one that society recognizes as reasonable. Id. at 361. Finally, the court addressed the weaknesses in plaintiff's Fourteenth Amendment "personal security" claim. The Due Process Clause of that amendment provides that a "state" shall not "deprive any person of life, liberty, or property, without due process of law." Under the clear precedent of DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), the Fourteenth Amendment exists "to protect the people from the State, not to ensure that the State protect[s] them from each other."

In the court's official Order, the court explicitly

referenced Rule 11 and cautioned plaintiff and his counsel to carefully examine the legal merit of any claims submitted to this court." 1/8/96 Order, at 7. The court also provided plaintiff with "the option of abandoning his federal claims and electing to sue in state court." Id. at 8.

Plaintiff responded by submitting a first amended complaint that was a near-replica of plaintiff's original complaint. Plaintiff's concession to the court's dismissal of his federal claims was to delete from his complaint one cause of action for discrimination in a place of public accommodation. 42 U.S.C. § 2000(a). In its Order of January 8, 1996, the court "strongly encouraged plaintiff to examine the options as they apply to all named defendants, not simply defendant City of San Diego." 1/8/96 Order, at 8. However, plaintiff persisted in naming the concert promoter and the concert concessionaire, respectively, as defendants in his amended complaint. Plaintiff suggested that federal liability attached to defendant Bill Silva because the defendant "knew the requirements that needed to exist to obtain the permit to promote the concert." (Pl.'s 2d Mem. of P. & A. in Opp'n at 13). Plaintiff also implied that

defendant SAC, the food concessionaire, maintained control over the restroom facilities at the Stadium or the concert-goers who entered the restrooms. (Pl.'s Am. Compl. ¶¶ 9, 12, 23).

Once again, the premise for plaintiff's federal suit was the presentation of a federal question. 28 U.S.C. § 1331. Several defendants challenged the sufficiency of plaintiff's amended complaint. The court granted their motion to dismiss with prejudice the action in its entirety for a failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12 (b) (6). Defendants City of San Diego and SAC now move the court for sanctions, maintaining that plaintiff's complaints were frivolous and filed for an improper purpose in violation of Rule 11.

## DISCUSSION

Federal Rule of Civil Procedure 11 permits a court to impose sanctions upon a plaintiff and/or his counsel for engaging in certain offenses. In pertinent part, the Rule provides:

> (b) Representations to Court.
>
> By presenting to the court (whether by signing,

filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have

> evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery...

In the event that a court determines that Rule 11 has been violated, the court has the discretion to impose an appropriate sanction upon the attorneys, law firms, or other parties who have engaged in the prohibited behavior. Fed. R. Civ. P. 11(c).

Deterrence is the touchstone for the imposition of Rule 11 sanctions. The purpose of the Rule has never been to chill vigorous advocacy, but rather to "reduce the burden on district courts by sanctioning and hence, deterring, [parties] who submit motions or pleadings which cannot reasonably be supported in law or fact." Golden Eagle Distribution Corporation v. Burroughs Corporation, 801 F.2d 1531, 1542 (9th Cir. 1986).

Case law provides an overlay for Rule 11 interpretation. A court may impose sanctions if a party either files a paper for

an improper purpose or files a "frivolous" paper. Zaldivar v. City of Los Angeles, 780 F.2d 823, 832 (9th Cir. 1986). The question of a pleading's "improper purpose" is distinct from the question of its "frivolousness." A finding of both "frivolousness" and "improper purpose" will factor into the total amount of sanctions assessed against the offender. In re Yacrman, 796 F.2d 1165, 1183 (9th Cir. 1986).

Defendants City of San Diego and Service America urge the court to make a determination that plaintiff's complaints were filed "for any improper purpose, such as to harass" a defendant and that plaintiff filed "frivolous" pleadings. Zaldivar, 780 F.2d at 832

> ("Without question, successive complaints based upon propositions of law previously rejected may constitute harassment under Rule 11").

The City and SAC argue that Rule 11 sanctions should follow from the filing of plaintiff's original complaint as well as his first amended complaint. (Def. City's Mem. of P. & A. in Supp. at 2-3; Def. SAC's Not. of Mot. and Mot. for Sanctions at 2).

The City also asks that the court issue sanctions pursuant to 28 U.S.C. § 1927. That section provides:

> Any attorney... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct.

Imposition of sanctions under this section requires a finding that the attorney acted recklessly or in bad faith. U.S. v. Associated Convalescent Enterprises, Inc" 766 F. 2d 1342, 1346 (9th Cir. 1985). Mere negligent conduct is not sufficient. MGIC Indemnity Corp. v. Moore, 952 F.2d 1120, 1122 (9th Cir. 1991).

Both defendant City and defendant SAC attempted to have plaintiff withdraw the complaint prior to the filing of their sanction motions. The court concludes that defendants-actions

were in substantial compliance with the "safe harbor" provision of Fed. R. Civ. P. 11(c)(1). Thus, the court finds that the "safe harbor" provision does not preclude it from awarding sanctions in this case. On December 1, 1995, defendant City served plaintiff's counsel with a sample: Rule 11 motion describing the conduct that subjected plaintiff to the possibility of sanctions. On February 13, 1996, defendant City wrote plaintiff's counsel to extend an opportunity to withdraw the first amended complaint. (Def. City's Mem. of P. & A. in Supp. of Sanctions Mot., Exs. A & B).

Service America also contacted plaintiff regarding the basis of the litigation pending against SAC. On or about January 2, 1996, counsel for Service America called plaintiff's counsel to clarify the basis on which plaintiff was alleging SAC liability. Counsel responded, "[Service America] sold him the beer."[1] (Fiacco Decl. ¶ 2). In the course of opposing plaintiff's amended complaint, Service America described how plaintiff's

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[1] Among the factual allegations presented in plaintiff's original complaint was that plaintiff purchased and consumed beer following his first distressful bathroom encounter, thus necessitating several additional trips to the bathroom. (Pl.'s Compl. ¶¶ 20, 28, 34, 36).

pleadings qualified for the imposition of Rule 11 sanctions, thus putting plaintiff on notice. (Def. SAC's Mem. of P. & A. in Supp. of Mot. to Dismiss Am. Compl. at 2). On approximately March 11, 1996, Service America also discussed the prospect of a voluntary dismissal with counsel for plaintiff. (Fiacco Decl ¶ 3). Counsel for plaintiff refused to remove the concert concessionaire from the list of defendants charged with constitutional and statutory violations in the amended complaint.

Above and beyond the notice provided by the defendants, plaintiff was warned of the possibility of sanctions by the court. In dismissing plaintiff's original complaint, the court emphasized the liberal standards governing amendment of deficient pleadings. Fed. R- Civ. P. 15 (a). The court granted plaintiff thirty days' leave to amend in an opinion laced with cautionary language. The court's dismissal Order of January 8, 1996 recited several of the provisions of Rule 11. The Order further cautioned plaintiff and his counsel "to carefully examine the legal merit of any claims submitted to this court." 1/8/96 Order, at 7.

The court explained how the essential element of "state action" was missing from plaintiff's claims as to SAC and the concert promoter, and "strongly encouraged plaintiff to examine the options as they apply to all named defendants." Id. at 8. Finally, the court provided plaintiff with "the option of abandoning his federal claims and electing to sue in state." Id. Plaintiff nonetheless proceeded to file an amended complaint that echoed the original complaint in its deficiencies and its naming of defendants.

The court concludes that plaintiff and his counsel have engaged in sanctionable conduct. The court and the moving parties heeded Ninth Circuit authority by bringing the sanctionable behavior to the immediate attention of the offending parties. In re Yagman, 796 F.2d at 1184. Plaintiff was put "on clear and fair notice of possible liability" at the time of the issuance of the court's first Order dismissing the complaint for failure to state a claim. The allegations of constitutional and statutory violations in plaintiff Is original complaint may be excusable, albeit strained. See Greenburg v. Sala, 822 F.2d 882, 887 (reminding the court that Rule 11 is not

meant "to chill an attorney's enthusiasm or creativity").

However, the near-identical allegations of constitutional and statutory violations in plaintiff's amended complaint are unsupported by the facts of the case or the relevant law.

Plaintiff conspicuously ignored this court's suggestion that the allegations contained in plaintiff's original complaint had Rule 11 implications. The court sees patent frivolousness in plaintiff's amended complaint, especially given the court's admonition prior to granting plaintiff leave to amend. Rule 11 sanctions are entirely appropriate under the circumstances presented by this case.

This court assesses Rule 11 sanctions against plaintiff's counsel for the filing of plaintiff's "frivolous" amended complaint. Fed. R. Civ. P. 11 (b)(2) . The court need not find, in addition, that subjective bad faith motivated the filing. A "frivolous" suit "denote[s] a filing that is both baseless and made without a reasonable and competent inquiry." Townsend v. Holman Consulting Corporation, 929 F.2d 1358, 1362 (9th Cir. 1990). An objective legal standard applies to determinations of frivolousness. Riverside Savings Bank v.

National Mortgage Equity Corp., 893 F.2d 1109 (9th Cir. 1990).

The court holds that plaintiff's counsel is liable under Rule 11 for his representations to the court. The Ninth Circuit supports the imposition of sanctions for "[a] paper filed in district court and signed by an attorney or an unrepresented party [which] is frivolous, legally unreasonable, or without factual foundation, even though the paper was not filed in subjective bad faith." Zaldivar, 780 F.2d at 831. Prior to the submission of the amended complaint, plaintiff and his counsel failed to conduct a reasonable investigation into the law and the facts of the claim.[2] Sanctions may follow from a failure to investigate both the law and the facts. Golden Eagle Distributing, 801 F.2d at 1536. An attorney "should not be able to proceed with impunity in real or feigned ignorance of authorities which render his argument meritless." Id., 801 F.2d at 1542. Counsel's pre-filing inquiry regarding the alleged

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[2] It is clear that a party with arguable meritorious claims may not pepper his complaint with frivolous claims and then hold the meritorious claims as a shield against the imposition of sanctions. Cross & Cross Properties v. Everett Allied Co., 886 F.2d 497, 505 (2d Cir. 1989)

"federal" claims was not objectively reasonable, as measured by the conduct of a competent attorney admitted to practice before the district court. Zaldivar, 780 F.2d at 830.

The court also holds plaintiff, Bob Glaser, an attorney, liable under Rule 11 for creating a "needless increase in the cost of litigation." Fed. R. Civ. P. 11(b)(1). Business Guides, Inc. v. Chromatic Communications Enterprises, Inc. 498 U.S. 533, 550 (1991) (holding that represented clients may be competent to make the necessary pre-filing inquiry, given that "party litigants may have a great deal of litigation experience"). Similarly, the court is not persuaded that counsel acted reasonably in filing plaintiff's *amended complaint* under the facts and the law applicable to the claims. Orange Production Credit v. Frontline Ventures, Ltd., 792 F.2d 797 (9th Cir. 1986) (affirming Rule 11 sanctions against a party who filed a complaint in federal district court when that party should have known that the complaint lacked a factual foundation for federal subject matter jurisdiction) The court emphasizes: "[e]xtended research alone will not save a claim that is without legal or factual merit from the penalty of sanctions." Zaldivar, 780 F.

2d at 831. The court holds that the present case is lacking both in legal and factual merit.

The court does not consider the naming of defendant concert concessionaire, in particular, to be an act of imprecision at the start of the lawsuit. The court questions counsel's selection of a concert concessionaire and a concert promoter, among others, as defendants in an action whose federal jurisdiction was based upon claims requiring **state action.** Overlooking this fact, the court finds that the filing of plaintiff's first amended complaint, again naming these defendants, was conducted without reasonable inquiry. The information reasonably available to counsel at *the time of the filing of the first amended complaint* should have put counsel on firm notice that defendant SAC and the concert promoter were not state actors subject to liability in a federal court. Zaldivar, 780 F.2d at 831 (holding that standard of reasonable knowledge is an objective one).

In the case of Gaskell v. Weir, 10 F.3d 626 (9th Cir. 1993), the Ninth Circuit upheld the lower court's assessment of sanctions against a party who filed a § 1983 claim in a factual

context in which state action was absent. The appellate court observed:

> In imposing sanctions against Canatella for a frivolous complaint, the district court determined that the allegations of state action in support of the section 1983 claim were so baseless that the complaint was frivolous. We agree. "[W]hen private parties make use of state procedures with the overt, *significant assistance* of state officials, state action may be found." [Citations omitted]. In performing the ministerial act of accepting and filing the settlement documents, the court clerk, S.L. Weir, did not provide "significant assistance" to the alleged conspiracy. To hold otherwise would import "state action" into private acts where a state

> actor plays nothing more than a ministerial role. The complaint was patently frivolous.

Id. at 628. The court reaches the same conclusion in the present case.

In his opposition papers, plaintiff suggests for the first time that plaintiff was "making a reasonable argument for an extension of existing law" when he insisted that the named defendants were culpable of privacy violation. (Pl.'s Opp'n at 9-10). The court observes that in past pleadings and arguments before the court, plaintiff maintained that the constitutional right to privacy, *as understood by existing case law,* encompassed plaintiff's situation. (Pl.'s Mem. of P. & A. in Opp'n to Dismissal of Am. Compl. at 7). In support of plaintiff's first amended complaint, plaintiff declared that he had both a subjective expectation of privacy and a societally-reasonable expectation of privacy, as required under the test enunciated in Katz v. United States, 389 U.S. 347 (1967).

The court has considered plaintiff's new arguments. This court does not intend to dissuade attorneys from pursuing

"hardfought, energetic and honest representation." In re Yagman, 796 F.2d at 1182. Nevertheless, the near-replica of the original complaint and previous brieiing in support of the amended complaint created an unwarranted expense under Fed. R. Civ. P. 11 (b)(1).

The court stops short of deciding that plaintiff's action was filed for an "improper purpose" as otherwise defined by Fed. R. Civ. P. 11 (b)(1). There are indications that plaintiff appeared on radio and television programs and sought relief in federal court all in an effort to coerce the City to build additional restrooms at the stadium. (Def. City's Mem. of P. & A. in Supp. of Sanctions Mot. at 9). However, the court declines to speculate on plaintiff's motives in bringing the litigation. Because the court does not reach the issue of bad faith, the court denies the City's request for 28 U.S.C. § 1927 sanctions.

This is not a case in which the persistence of plaintiff's frivolous claims had no appreciable effect on the litigation. Defendants City and Service America Corporation, not to mention the other named defendants, devoted significant

resources in defending against a meritless suit not once, but twice. By this holding the court aims to deter the repetition of the sanctionable conduct set forth above. Fed. R. Civ. P. 11(c)(2).

Having described the sanctionable conduct and explained the basis for the imposition of sanctions, the court finds that the sole remaining issue is the proper amount of sanctions. Fed. R. Civ. P.11 (c) (3). The court asks the parties to submit declarations and supporting documents that further quantify the expenses incurred in connection with the case. See In Re Yagman, 796 F.2d at 1183

> ("the amount of the sanctions and the manner in which they are imposed cannot be inconsistent with the purpose and directive of the authority on which sanctions are based").

The court will only consider claims for costs arising from the date of January 8, 1996 -- when the court issued its Order granting without prejudice defendants' motion to dismiss and granting plaintiff leave to amend -- through and including March 25, 1996, when the court held its hearing on the

dismissal of plaintiff's first amended complaint. The court notes that the parties have submitted declarations detailing the outlay associated with attorneys' fees and expenses from start to finish of the litigation in this district court. (Def. SAC's Suppl. Not. of Sanctions at 2; Gordon Decl. ¶¶ 4, 5) The court asks that the parties narrow their sanction request to the period described above, that timeframe in which plaintiff might have refrained from filing or withdrawn the offending amended complaint. The court further requests that the moving parties consider whether the costs were reasonably and necessarily incurred and omit expenses that are generally subsumed under the category of normal office overhead.

Finally, the court declines plaintiff's invitation to impose Rule 11 sanctions upon defendants for filing what plaintiff describes as "frivolous sanction motions." (Pl.'s Opp'n at 3).

## CONCLUSION

After reviewing the parties', papers and entertaining oral argument, the court grants defendants' sanction motions. The court imposes Rule 11 sanctions against both plaintiff, an attorney, and his counsel of record for the filing of a frivolous

amended complaint that needlessly increased the cost of the litigation. The total amount of Rule 11 sanctions has yet to be determined. The court declines to impose sanctions pursuant to 28 U.S.C. § 1927.

The court directs the parties seeking sanctions to file and serve supplemental documentation tallying the costs incurred in defense of the amended complaint. The court requests briefing on attorneys' fees and costs expended in the period ranging from January 8, 1996 -- the date of the court's Order dismissing plaintiff's original complaint -- up to and including March 25, 1996 -- the date of the second hearing on defendants' renewed motions to dismiss. Briefing will be due with the court no later than two weeks from the date of this signed Order. The court will then review the parties' papers and assess the amount of sanctions accordingly.

IT IS SO ORDERED.

DATED: 5-13-96

/s/ Marilyn L. Huff
MARILYN L. HUFF, JUDGE
UNITED STATES DISTRICT COURT

[SEAL]

**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

BOB GLASER,

Plaintiff,

vs.

CITY OF SAN DIEGO, WJS III, INC. dba BILL SILVA PRESENTS, STAFFPRO SERVICES, INC.; SERVICE AMERICA; ACE PARKING, INC., and DOES 1 through 100, inclusive,

Defendant.

CASE NO.
CV 95-3632 H (BTM)

(Filed
April 1, 1996

**ORDER GRANTING WITH PREJUDICE DEFENDANTS' MOTION TO DISMISS WITH PREJUDICE**

On March 22, 1995, plaintiff attended a concert at the Jack Murphy Stadium in San Diego featuring the singers Elton John and Billy Joel. During several trips to the men=s restroom, plaintiff encountered female concert-goers at the unpartitioned urinal. Plaintiff filed a complaint for injunctive relief, declaratory relief, and damages, arising from his resulting inability to Aenjoy the concert and...perform his necessary bodily functions without unnecessary difficulty.@ (Pl.=s Compl. & 96). Following a court hearing on January 2, 1996, this court dismissed plaintiff=s original complaint and granted plaintiff to leave to amend to state a federal cause of action.

Defendants City of San Diego ("City") Service America Corporation ("SAC") , and WJS III, Inc. dba Bill Silva Presents (ABill Silva@) now move the court to dismiss plaintiff's first amended complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). By the court's Order of January 8, 1996, the court granted plaintiff "one opportunity to rectify his complaint." The court has reviewed the papers and again heard oral argument. Plaintiff has not made use of his opportunity to present this district court with a viable suit. Defendants' motion to dismiss is **granted** with prejudice.

## DISCUSSION

If the complaint fails to state a claim, the court should grant leave to amend unless it appears beyond a doubt the plaintiff would not be entitled to relief under any set of facts proved. Halet v. Wend Inv. Co., 672 F.2d 1305, 1309 (9th Cir. 1982). The Supreme Court has stated that,

> "if as a matter of law it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations, a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one."

Neitzke v. Williams, 490 U.S. 319, 327 (1989).

The allegations in plaintiff's complaint lack a "cognizable legal theory" or sufficient facts to support a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). Plaintiff has not stated a sufficient federal claim to withstand defendants' motion to dismiss. Because the court previously granted leave to amend and plaintiff has failed to allege any set of facts under which plaintiff may recover, the court dismisses the case without leave to amend. Fed. R. Civ. P. 12(b)(6). See Foman v. Davis, 371 U.S. 178, 182 (1962) (holding that a court may

deny leave to amend due to "futility of amendment" or "failure to cure deficiencies by amendments previously allowed").

Plaintiff has submitted a first amended complaint that is a near-replica of Plaintiff's original complaint, dismissed by this court on January 2, 1996. one example of this is plaintiff's reassertion of "loss of earnings" based upon plaintiffs displeasure with the $50.00 cost of his concert ticket. (Pl.'s Am. Compl. && 13,70). Plaintiff's concession to the court's dismissal of his federal claims has been to delete from his complaint one cause of action for discrimination in a place of public accommodation. 42 U.S.C. ' 2000(a). In its Order of January 8, 1996, the court Astrongly encouraged plaintiff to examine the options as they apply to all named defendants, not simply defendant City of San Diego.@
The court noted that plaintiff had voluntarily dismissed without prejudice defendant Ace Parking, an entity that had provided parking services on the night of the concert. However, plaintiff persists in naming the concert promoter and the concert concessionaire, respectively, as defendants in his amended complaint, in addition to defendant City of San Diego.

Once again, the premise for plaintiff's federal suit is the presentation of a federal question. 28 U.S.C. ' 1331. The court therefore addresses the sufficiency of plaintiff's federal claims before exercising jurisdiction to reach the pendent state

claims. 28 U.S.C. ' 1367(c)(3); see United Mine Workers v. Gibbs, 383 U.S. 715, 72G (1998). Plaintiff's amended complaint echoes plaintiff's original complaint in naming the following federal claims: civil rights violation under 42 U.S.C. 1983 and violation of the Fourteenth Amendment's assurances of personal security and privacy. (Pl.'s Am. Compl. && 81-87). Each of plaintiff's federal claims, as alleged, are insufficient to withstand 12(b)(G) dismissal.

Plaintiff again fails to state a claim for invasion of privacy under the Fourteenth Amendment. Plaintiff's fourth cause of action for privacy invasion in the amended complaint parallels plaintiff's fourth cause of action for privacy invasion in the original complaint. There is no constitutional right of privacy regarding activities exposed to public view. Katz v. United States, 389 U.S. 347 (1987). Two requirements are necessary for a plaintiff to have a legitimate expectation of privacy: first, a person must have a subjective expectation of privacy; second, the expectation must be one that society recognizes as reasonable. Id. at 36l.

Under the facts set forth in plaintiff's complaint, plaintiff does not have a reasonable expectation of privacy. As the Seventh Circuit put it in Dimeo v. Griffin, 943 F.2d 679, 682 (7th Cir. 1991), urination is

Afor most men, not highly private. Men urinate

> side by side in public restrooms without embarrassment even though there is usually very little, and often no, attempt to partition the urinals.@

Id. In this case, plaintiff's complaint concedes that he was not in a partitioned stall.

Furthermore, society is not prepared to recognize plaintiff's personal expectations of privacy in this context. In Smayda v. United States, 352 F.2d 251 (9th Cir. 1965), cert. denied, 382 U.S. 981 (1966), the Supreme Court upheld a decision that rejected the argument that an occupant of an enclosed public stall had a reasonable expectation of privacy. As the Ninth Circuit explained,

> Aa great deal of privacy is taken out of these toilet stalls by the fact that they're wide open for three feet at the top and they're wide open for approximately eighteen inches at the bottom. They are almost public.@

Id. at 254. In light of the court's holding on the limited privacy right afforded to occupants of enclosed *stalls,* the court rejects plaintiff's Aexpectation of privacy@ at a urinal he himself deemed a Atrough.@ Plaintiff has not stated a cognizable claim for violation of a constitutional right of privacy.

Moreover, the court finds plaintiff's privacy argument

strained under the facts presented in plaintiff's complaint. Plaintiff=s assertion of defendants 11 full knowledge that the effects of alcohol required the frequent excretion of bodily fluids@ can likewise be imputed to plaintiff. (Pl.=s Am. Compl. & 89) . Plaintiff maintains that he was confronted with the presence of women on approximately five visits to the men's restroom. (Pl.'s Am. Compl. && 42, 47). Given plaintiff's repeated consumption of beverages and frequent restroom use, the court observes that plaintiff continued to use the available urinal, rather than utilizing one of the five closed stalls that plaintiff concedes were provided in each of the thirty-six men's restrooms at the Stadium. (Pl.'s Am. Compl. & 64).

A plaintiff stating a claim under ' 1983 must allege: 1) that the challenged conduct was committed by a person acting under color of state law, and 2) that the conduct deprived the plaintiff of a constitutional right. Balistreri v. Pacifica Police Department, 901 F.2d 696, 699 (9th Cir. 1988) Plaintiff in this action has not set forth adequate facts showing that the concert promoter and the concert concessionaire meet the Astate action@ requirement. Wyatt v. Cole, 504 U.S. 158, 161 (1992). With regard to defendant City, the court notes that members of the general public generally have no constitutional right to sue state employees who fail to protect them against

harm inflicted by third parties. DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 195-96 (1989) (Holding that the Fourteenth Amendment only protects people from the state, and not from one another). The harm that plaintiff alleges arises from the actions of the female concert-goers who occupied plaintiff's unpartitioned urinal.

In limited circumstances, the courts have recognized a claimant's constitutional right to sue state actors who fail to protect them from harm inflicted by third parties. Under the Aspecial relationship@ exception, a person in the custodial care of the state may assert liability based on abuse of the special relationship. Under the Adanger creation@ exception, a state actor must affirmatively place a person in a situation of danger that leads to third party violence in order for that person to state a claim. L.W. v. Grubbs, 974 F.2d 119, 121 (9th Cir. 1992), cert. denied, 113 S.Ct. 2442 (1993).

1. Custodial Care/Special Relationship Exception Plaintiff suggests that he had a Aspecial relationship@ with agents of defendant City based upon his voluntary attendance at the Stadium during the concert, (Pl.=s Am. Compl. & 40, 53). Plaintiff further describes his urination as Aaddressing a necessary bodily function and medical necessity.@ (Pl.=s Am. Compl. && 14, 25, 29, 34, 36-38, 44, 47, 58, 64, 66). Plaintiff's argument is that the actions of defendants amounted

to Adeliberate interference. (Pl.=s Am. Compl. && 39, 44, 71). Plaintiff=s assertions fail to bring plaintiff within the Acustodial care@ exception to ' 1983.

In Estelle v. Gamble, 429 U.S. 987 (1976), the Supreme Court held that state officials must provide adequate medical care to confined individuals. A violation occurs when prison officials demonstrate Adeliberate indifference to serious medical needs of prisoners.@ Gamble 429 U.S. at 104. See also Wood v. Housewright, 900 F.2d 1332,1334-35 (9th Cir. 1990) (holding that a civil rights action against prison officials for Adeliberate indifference,@ must indicate more than isolated occurrences of neglect). A showing of mere negligence in diagnosis or treatment does not constitute a violation of a prisoner's civil rights. Id.

Under the present circumstances, plaintiff fails to state a claim that defendants exhibited a deliberate indifference to an individual with whom they shared a Aspecial relationship.@ A state's Aawareness of a victim's plight, by itself, will not create a special relationship.@ Balistreri, 855 F.2d at 1426. Plaintiff concedes that he voluntarily attended the Elton John and Billy Joel concert, and was not restrained from leaving. (Pl.'s Am. Compl. && 13, 24). As the Supreme Court states,

> Awhen the State takes a person into its custody and holds him there against his will, the

> Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.@

DeShaney, 489 U.S. at 199-200. Plaintiff was not involuntarily committed to the Stadium for the duration of that March evening. Plaintiff chose to stay at the concert and to Aattempted to relax and not have the recent events destroy his evening.@ (Pl.'s Am. Compl. & 24).

2. Danger Creation Exception

Similarly, plaintiff's amended complaint does not bring his case within the realm of the Adanger creation@ exception. On a 12(b)(6) motion, the court is under no obligation to Anecessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations.@ Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

Plaintiff does not allege for purposes of the exception that a state actor affirmatively placed him in a situation of danger that led to third party violence. See Wood v. Ostrander, 879 F.2d 583, 588 (9th Cir. 1989), cert. denied, 498 U.S. 938 (1990); Grubbs, 974 F.2d at 121 (holding that plaintiff nurse at a custodial institution stated a claim under ' 1983 in situation in which she asserted that state's knowing and intentional work assignment of plaintiff with violent sex offender led to her

battery, kidnaping, and rape).

In the Adanger creation@ cases, it is essential that a state actor create the danger through his or her placing of an individual in a position of dependence and helplessness. See Jackson v. City of Joilet, 715 F.2d 1200, 1206 (7th Cir. 1983) (grossly negligent-rescue attempt not actionable under ' 1983 where plaintiff's decedents already trapped in burning car when police arrived), cert, denied, 465 U.S. 1049 (1984) Under the analysis in the Grubbs case, the named defendants may be said to have used their authority as state correctional officers Ato create an opportunity that would not otherwise have existed@ for a third party to assault plaintiff. Grubbs, 974 F.2d at 121. Plaintiff presents a different factual scenario when he describes his voluntary entry into the Jack Murphy Stadium Afor the purpose of attending and enjoying the Elton John and Billy Joel concert@ and defendants who Aexpect the patrons to stay and enjoy the events.@ (Pl.'s Am. Compl. & 13; Pl.'s Mem. of P. & A. at 9).

Defendants did not, by their actions, use the authority of the state to invite the female concert-goers to confront or assault plaintiff.

Plaintiff=s third cause of action, for violation of his Fourteenth Amendment Apersonal security@ interest, again fails for the same reasons that plaintiff's original third cause of

action for violation of his personal security interest failed. Namely, the Due Process Clause of the Fourteenth Amendment provides that a Astate@ shall not Adeprive any person of life, liberty, or property, without due process of law.@ The Constitution does not guarantee plaintiff a Fourteenth Amendment Aliberty@ interest to be protected by the state from private intrusions upon his alleged personal security under the facts as alleged. The Due Process Clause serves Ato protect the people from the State, not to ensure that the State protect[s] them from each other.@ DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989). Plaintiff=s attempt to allege a violation of a federal constitutional right fails as to all defendants.

**CONCLUSION**

Having reviewed the record and heard oral argument, the court **grants** with prejudice defendants, motion to dismiss the litigation in its entirety. The court sets a date of Monday, May 13, 1996, at 10:30 a.m. in Courtroom 8 for separate consideration of the requested Rule 11 sanctions.

IT IS SO ORDERED.

DATED: March 29, 1996

/s/ Marilyn L. Huff

MARILYN L. HUFF, JUDGE

UNITED STATES DISTRICT COURT

[SEAL]

**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| BOB GLASER,<br><br>Plaintiff,<br><br>vs.<br><br>CITY OF SAN DIEGO, WJS III, INC. dba BILL SILVA PRESENTS, STAFFPRO SERVICES, INC.; SERVICE AMERICA; ACE PARKING, INC., and DOES 1 through 100, inclusive,<br><br>Defendant. | CASE NO. CV 95-3632 H (BTM)<br><br>(Filed January 8, 1996)<br><br>**ORDER GRANTING WITHOUT PREJUDICE DEFENDANT'S MOTION TO DISMISS; GRANTING PLAINTIFF LEAVE TO AMEND** |

On October 31, 1995, plaintiff filed with the court a complaint for injunctive relief, and damages, stemming from an incident in which female concert-goers shared plaintiff's urinal. According to the allegations in plaintiff's complaint, plaintiff attended a concert at the Jack Murphy Stadium in San Diego and was "confronted by the presence of women" while "urinating in a trough in one of the men's restrooms." (Pl.s' Compl. ¶ 3) Plaintiff's complaint charges several defendants[1] with violation of his federal and state rights.

Defendant City of San Diego, the owner and operator of the Stadium, now moves the court to dismiss the action for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). On January 2, 1995, at 10:30 a.m., the court held a hearing a defendant's motion. Jeffrey S. Schwartz appeared on plaintiff's behalf. Eugene P. Gordon appeared on behalf of defendant City of San Diego.

After reviewing the facts and the law, the court rules as follows. The court grants without prejudice defendant's motion to dismiss the complaint. The court will also grant plaintiff thirty days leave to amend the complaint to cure its deficiencies. The court reserves the right to dismiss the action with prejudice in the event that plaintiff fails to timely file his amended complaint in federal court.

## DISCUSSION

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[1] The court notes with approval that plaintiff has voluntarily dismissed without prejudice defendant Ace Parking, Inc., a defendant whose role in the litigation was apparently limited to the provision of parking facilities on the night of the concert.

The court emphasizes at the outset that this case is not about the City's level of enforcement of a local ordinance assigning the sexes to separate bathroom facilities. The court agrees that the City should enforce the ordinance, or take appropriate steps to ensure that men and women have proportionate access to the bathrooms designed for them.

However, federal courts are courts of limited jurisdiction. Federal jurisdiction is premised either upon diversity of citizenship or upon the presentation of a federal question. 28 U.S.C. §§ 1331, 1332. This case does not fall within the category of a diversity case. Instead, plaintiff's complaint alleges the following federal claims: breach of his civil rights pursuant to 42 U.S.C. § 1983, discrimination pursuant to 42 U.S.C. 9 2000(a), and violation of the Fourteenth Amendment's assurances of personal security and privacy. (Pl.s' Compl. ¶¶ 66, 67, 69, 72).

Because plaintiff has initiated his action in federal court, this court first examines plaintiff's federal claims on defendant's motion to dismiss. 28 U.S.C. § 1367(c)(3). If plaintiff's claims do not suffice to present a federal question, plaintiff has one of two options. Plaintiff may elect to amend his complaint in federal court to bolster the federal claims presented. Or, alternatively, plaintiff may sue in state court should he determine that his state claims are supported.

The court concludes that each of plaintiff's federal claims lacks merit. Accordingly, the court dismisses without prejudice plaintiff's claims for federal statutory and constitutional relief. Fed. R. Ci.v. P. 12 (b) (6) Plaintiff is correct in that a court considering a motion to dismiss must

accept as true all of the nonmovant's material allegations of fact and must construe those allegations in the light most favorable to the nonmovant. North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983). However, a court may grant a Rule 12(b)(6) dismissal where there is either a lack of a cognizable legal theory, or the absence of sufficient facts alleged under a cognizable theory. Balistreri v. Pacifica Police Department, 901 F.2d 696, 699 (9th Cir. 1990).

The court initially observes that at no time did plaintiff opt to use a private bathroom stall, but instead plaintiff continued to urinate at a urinal that his complaint describes as a "trough." (Pl.'s Compl. ¶¶ 3, 14, 16). The court also notes the allegations in plaintiff's complaint to the effect that plaintiff continued to purchase and consume beer following his first bathroom encounter, thus necessitating several additional trips to the bathroom.
Compl. ¶¶ 20, 28, 34, 36).

The court finds that under the law and the facts as alleged, plaintiff fails to state a claim under 42 U.S.C. § 1983, which requires that the challenged conduct arise from "state action." See Wyatt v. Cole, 504 U.S. 158, 161 (1992); Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621, 624 (9th Cir. 1988). The city did not *affirmatively* place the women in the men's restroom, nor did the city *affirmatively* direct them there. The actions of private actors, the women sharing the urinal, do not qualify for § 1983 relief. However, plaintiff could choose to sue these women in state court under a different cause of action.

Mere negligence on the part of a state actor is no basis

for a § 1983 claim. Borunda v. Richmond, 885 F.2d 1384, 1391 (9th Cir. 1988). While it is true that in certain limited circumstances, state inaction could result in a §1983 action, the allegations of plaintiff's complaint do not present these circumstances.

Plaintiff fails to state a claim under 42 U.S.C. § 2000(a) for discrimination at a place of public accommodation. The court notes that restrooms accommodating each gender were provided, were available, and were open on the night of the concert. That certain women chose to utilize male facilities does not implicate any of the named defendants. Plaintiff fails to allege any discriminatory acts that would give rise to liability under the statute.

In addition, plaintiff fails to state a claim under the Fourteenth Amendment. There is no constitutional right of privacy regarding activities exposed to public view. Katz v. United States, 389 U.S. 347 (1967). Two requirements are necessary for a plaintiff to have a legitimate expectation of privacy: first, a person must have a subjective expectation of privacy; second, the expectation must be one that society recognizes as reasonable. Id. The court repeats that plaintiff was utilizing a urinal, or "trough" in his own words. (Pl.'s Compl. ¶ 3) . It is a given that plaintiff expected to be viewed by other men. While it is unfortunate that plaintiff was also viewed by women, this fact does not create a federal claim.

Under the facts set forth in plaintiff's complaint, plaintiff could not have had an actual expectation of privacy. As the Seventh Circuit put it in Dimeo v. Griffin, 943 F.2d 679, 682 (7th Cir. 1991), urination is

> "for most men, not highly private. Men urinate side by side in public restrooms without embarrassment even though there is usually very little, and often no, attempt to partition the urinals."

Id.

Furthermore, society is not prepared to recognize plaintiff's personal expectations of privacy in this context. In Smayda v. United States, 352 F.2d 251 (9th Cir. 1965), cert. den., 382 U.S. 981 (1966), the Supreme Court upheld a decision that rejected the argument that an occupant of an *enclosed public stall* had a reasonable expectation of privacy. As the Ninth Circuit explained,

> "a great deal of privacy is taken out of these toilet stalls by the fact that they're wide open for three feet at the top and they're wide open for approximately eighteen inches at the bottom. They are almost public."

Id. at 254. In light of the court's holding on the limited privacy right afforded to occupants of enclosed stalls, the court rejects plaintiff's "expectation of privacy" at a urinal he himself deemed a "trough."

Finally, plaintiff's Fourteenth Amendment "personal security" claim fails. The Due Process Clause of that amendment provides that a "state" shall not "deprive any person of life, liberty, or property, without due process of law." The constitution does not grant plaintiff a Fourteenth Amendment "liberty" interest to he protected by the state from private intrusions upon his alleged personal security under the facts as

alleged. The court finds that plaintiff has vastly misunderstood the parameters of the Due Process Clause which serves "to protect the people from the State, not to ensure that the State protect[s] them from each other." DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 196 (1989).

The court notes that many of plaintiff's state claims -- for nuisance, dangerous condition/premises liability, negligence, and breach of contract -- could be pursued in state court. However, the court on this motion reaches only those claims that purport to create federal jurisdiction. 28 U.S.C. § 1331. Plaintiff insists that "a valid City ordinance was violated and went unenforced." (Pl.'s Am. Mem. of P. & A. at 3). In reply, the court emphasizes that the breach of a local ordinance is not necessarily a wrong of constitutional magnitude.

Plaintiff asks that the court allow plaintiff to amend his complaint should the court grant defendant's motion to dismiss. (Pl.'s Am. Mem. of P. & A. in Opp In at 17) . The Ninth Circuit provides that if the complaint fails to state a claim, a court should grant leave to amend unless it appears beyond a doubt that the plaintiff would not be entitled to relief under any set of facts proved. Halet v. Wend Inv. Co. , 672 F. 2d 1305, 1309 (9th Cir. 1982). Although the court fails to see any federal connection at this stage, the court will allow plaintiff one opportunity to rectify his complaint.

The court grants plaintiff thirty days leave from the date of this signed Order to cure the deficiencies contained in the complaint. Fed. R. Civ. P. 15(a) (providing that "leave [to amend] shall be freely given"). However, the court cautions

plaintiff and his counsel to carefully examine the legal merit of any claims submitted to this court. In this regard, the court refers plaintiff to Fed. R. Civ. P. 11(b), which provides:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> ...

In the event that the court determines that Rule 11 has been violated, the court may impose an appropriate sanction upon the attorneys, law firms, or other parties who have engaged in the prohibited behavior. Fed. R. Civ. P. 11(c).

In light of the above ruling, plaintiff has the option of abandoning his federal claims and electing to sue in state court, assuming that plaintiff's state claims have merit. Plaintiff may instead decide to continue in federal court under the cautions provided above. In either case, the court would strongly encourage plaintiff to examine the options as they apply to all named defendants, not simply defendant City of San Diego.

## CONCLUSION

Having reviewed the record and heard oral argument, the court grants without prejudice defendant's motion to dismiss the complaint for failure to state a claim upon which relief may be granted. The court will grant plaintiff's request for thirty days leave from the date of this signed order to serve and file an amended complaint in the matter. The court specifically reserves the right to dismiss the action with prejudice in the event that plaintiff fails to timely file his amended complaint in federal court. The court further reminds plaintiff and his counsel of their Rule 11 obligations.

IT IS SO ORDERED.

DATED: 1/5/96

/s/ Marilyn L. Huff

MARILYN L. HUFF, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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| BOB GLASER, | ) | Case No. 95-3632-H |
| | ) | Civil |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| CITY OF SAN DIEGO, | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |
| _____ | ) | |

TRANSCRIPT OF MOTION HEARING
Held in San Diego, California
March 25, 1996

BEFORE THE HONORABLE MARILYN L. HUFF

Echo Reporting, Inc.
225 Broadway, Suite 350
San Diego, California 92101
(619) 238-5173

[SEAL]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORIA

| | | |
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| BOB GLASER, | ) | Case No. |
| | ) | 95-3632-H (BTM) |
| | ) | |
| Plaintiff, | ) | San Diego, |
| | ) | California |
| vs. | ) | |
| | ) | Monday |
| CITY OF SAN DIEGO, | ) | March 25, 1996 |
| | ) | 10:30 a.m. |
| | ) | |
| Defendant. | ) | |
| _____ | ) | |

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE MARILYN L. HUFF
UNITED STATES DISTRICT JUDGE

APPEARANCES:

| | |
|---|---|
| For the Plaintiff: | JEFFREY S. SCHWARTZ, ESQ.<br>501 West Broadway, Suite 1700<br>San Diego, California 92101 |
| For Defendant City of San Diego: | EUGENE P. GORDON, ESQ. |

| | |
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| For Defendant Service America Corp.: | GLENN DOSSOFF, ESQ. |
| For Defendant Bill Silva Presents: | REBECCA SMITH, ESQ. |
| Transcript Ordered By: | JEFFREY S. SCHWARTZ, ESQ. |
| Court Recorder: | Nancy Cablay<br>United States District Court<br>880 Front Street<br>San Diego, California 92189 |

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

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|---|---|
| Transcriber: | Adeline L. Carlson<br>Echo Reporting, Inc.<br>225 Broadway, Suite 350<br>San Diego, California 92101<br>(619) 238-5173 |

SAN DIEGO, CALIFORNIA,

MONDAY, MARCH 25, 1996, 10:30 A.M.

--Ooo--

(Call to order of the Court.)

MR. SCHWARTZ: Good morning, your Honor. Jeff Schwartz appearing on behalf of Bob Glaser.

MR. GORDON: Good morning, your Honor. Gene Gordon, City Attorney's office for the City of San Diego.

MR. DASSOFF: Good morning, your Honor. Glenn Dassoff,l Paul Hastings, Janofsky & Walker for Service America Corp.

MS. SMITH: Good morning, your Honor Rebecca Smith specially appearing for Bob Ottilie on behalf of Bill Silva Presents.

THE COURT: Okay. I've reviewed this. I think that the amended complaint is very similar to the prior complaint and the Court is considering giving a dismissal with prejudice. I don't think you've stated a federal claim. You may argue.

MR. SCHWARTZ: Thank you, your Honor. Once again, Jeff Schwartz, appearing on behalf of Bob Glaser, Plaintiff in this action.

It is my understanding being present and

preparing the paper work at the prior hearing, the Court made the determination specifically with regards to the issue of whether the constitution provided privacy and whether the facts alleged in the complaint were sufficient. What would the Court emphasize on I believe was the same as set forth by Kathwith v. United States (phonetic), which has two specific standards. Whether or not there is a subjective -subjective right to privacy and whether that right to privacy is reasonable and what society recommends.

Now, what the Plaintiff did in the first amended complaint was further clarify how that subjective right does apply specifically to his entry in the bathroom which was marked as single sex, which was marked exclusively for men, which he understood would be frequented by men exposing genitalia --

THE COURT: Where's the state action of Service America?

MR. SCHWARTZ: Okay. Let's address the state action of Service America and what I'm going to point the Court's attention to is Addicus v. S.H. Press & Company (phonetic) 398 U.S. Code 44 (1970) which was cited in our papers. Specifically one said private persons and since Service America is a corporation and doesn't fall under that standard, it

is jointly engaged with the state as a--willful participant.

Now, let's look at the relationship between Service America and state action. Service America has these concession stands in San Diego Jack Murphy Stadium and they have the contract with the city of San Diego. Their concession stands are located between the various men's and women's facilities. These are concession stands that have been in existence for a good number of years. These are concession stands where the actual individuals who are employed by Service America has seen the stand-in lines, has seen the women go into the men's room, has seen the lack of the single sex enforcement. The --

THE COURT: So what you're really complaining about is a political issue? The Equitable Restroom Act?

MR. SCHWARTZ: No, I don't think -- I think we're beyond a political issue, your Honor. I think the Court is proper to say that you do have -- should have an Equitable Restroom Act which, in fact, the state of California -- more specifically here, the City of San Diego, does not have.

I think you've addressed -- or questioned me how does Service America fall in? Service America through their contract with the city of San Diego is actually facilitating

the situation. Their purpose there is to sell refreshments -- refreshments will include alcoholic beverages and nonalcoholic beverages. It's an arena which has up to 54,000, sometimes 60,000 people, depending on the event. There are a limited number of facilities. This is a limited number which is not going to -- which was not determined back here in March of 1995 -- which has been in effect for the 20-some years the stadium has been in existence.

The Service America continues to sell these events which is -- by the next thing, a person has some beverages whether it be alcoholic or non-alcoholic and it's in a confined location for a period of three to five hours. It is reasonable that that individual will have to use the facilities. Service America is aware of the facilities -- they continue to serve these concessions, despite their contract with the City of San Diego, despite the fact they know what happens, so therefore they are continuing and they are facilitating the events. How is their state action, their contract with it and they are continuing to allow it to go on.

So I think it is a very clear nexus and a clear connection between what they are doing and where they are doing it.

THE COURT: They are supposed to build

bathrooms?

MR. SCHWARTZ: That's not -- the job to build bathrooms, to make the determination where there should be bathrooms -- how many bathrooms should be is directly with the City of San Diego. There is no dispute about that.

Service America with the knowledge of this event had a confined space and increased the problem. We argued there is a substantial duty since every single month, the third -- the first Thursday of every month there is a Stadium Board of Governors meeting. This has been going on for years and literally decades. Service America always has a representative there. This is an issue which they have heard about based on the enactment in 1983 which talks about security and single sex bathrooms. Based on the event which we brought to the Court's attention through our lodgement nine months before with the exact same situation. This is a situation which not only the City, but all of their contracting agents is aware of who attends those meetings which they are required to do.

THE COURT: So Addicus is your case on state action?

MR. SCHWARTZ: That is correct, your Honor.

THE COURT: Okay. Do you want to move on

to any other issues?

MR. SCHWARTZ: Thank you, your Honor.

The -- in the earlier proceedings, the Court cited quite a few cases, which is Smada (phonetic), Dinio v. Griffin (phonetic). We have addressed those in our opposition papers and clearly those were dealing with criminal activities, and if an individual is engaging in criminal activities such as the incarceration, such as the urine specimen -- when they have the criminal activities, the Court says then they would give up that expectation of privacy. This is not the case and each of those cases cited by the Defendants goes on to the next step that there may be expectation of privacy. I think the strong case was Dinio when it says, "No, most men don't have a reasonable expectation of privacy from urination", but it specifically says that there can be individuals and those individuals should be entitled to the expectation of privacy. Also the Court said that's the reason for the door on the stall, to have a modicum of privacy.

The issue goes on again to affirmative actions. Now, this is an argument that all Defendants have made, what affirmative actions have there been? Well, let's look at that particular night. There were, as alleged, I believe, in either 34 or 35 of the complaint, San Diego police officers who actually

stood by. They, at that moment, took that affirmative action to protect, to secure the restroom. As soon as they left, boom, women came into the bathroom. If they take upon a duty, shouldn't they be held to a standard to continue that duty? Now, that's on that particular night in question, but let's go back before that.

THE COURT: So you think the City needs to station police officers next to every restroom?

MR. SCHWARTZ: I think the City in its infinite wisdom has to pass an ordinance. It's an ordinance they should have been enforcing since 1983. Now, if, in fact, they would enact an ordinance when they know there is actually absolutely no way of enforcing it -- there are also private security there. The private security which was hired by Bill Silva Presents as a result of the permit process which they have in the City of San Diego -- so do they have a duty to enforce it? Yes. Having an ordinance which is enacted with absolutely no means of enforcing that ordinance with the knowledge of what goes on, and -- I think it's clear, your Honor, based on the allegations, based on the evidence which we presented in our lodgement and based on the Board of Governor minutes which were referenced in the first amended complaint, the City knows of this situation.

THE COURT: Now, a lodgment, then that's going beyond the pleadings.

MR. SCHWARTZ: What was that?

THE COURT: On a lodgement, that's going beyond the pleadings.

MR. SCHWARTZ: But the letters were referenced in the pleadings, your Honor. Those two letters -- the letter from the patron nine months prior had the exact same situation and the response by the City Manager was referencing things, your Honor. We have just presented the actual letters to further clarify what, in fact, was stated there.

But let's go back to the affirmative actions and what we also have in Cantry v. Harris (phonetic) -- excuse me, your Honor -- Cabrellas v. County of Los Angeles (phonetic), 864 Fed. 2d, 1454 (1988) it says that acts of co-mission, as well as acts of omission can be held responsible.

Now, here's a situation where the City knows the problem. They knew about it as recently as nine months. They do absolutely nothing about it. They say they are going to do something, and they can assure us they are going to do something, but they don't. They, in their minds say, "Well, let's see if we got caught". Now, finally, someone has stepped forward. This is -- the mere basis for their failure to act,

allowing it to continue, it's not -- they continue to allow it to continue. The City in their reply brief has stated, "Well, it may be there is a problem and we are looking into it". Then let's look at the stadium, how should they react? We've alleged in our complaint they've acted with deliberate indifference. The most recent definition of deliberate indifference was in Foreman v. Wright (phonetic). It's an unsettled U.S. Supreme Court case, but it's 14 -- 114 through pre-court (1970) (1994) case which puts deliberate indifference between mere negligence and knowingly and -- knowledge. So it's recklessness is what the Court said, and we argue that it is reckless, that they've had this knowledge for at least 10 years, your Honor.

THE COURT: What's the serious medical need of the Plaintiff as alleged?

MR. SCHWARTZ: The serious medical need is, once again, the situation he's in a confined arena for four hours. Now, the Defendants say there was no one keeping him there, he wasn't confined, but they sold tickets, they knew it was going to be for four hours, he consumed beverages, he had to urinate. If he did not urinate his bladder would be full, it would be a bad medical condition, you have serious medical needs and the mere fact --

THE COURT: Where do you get some -- where do I draw that conclusion that it would be a serious medical problem?

MR. SCHWARTZ: All right, having a full bladder for four hours, without an ability to drain that bladder, and the Plaintiff has stated that it was difficult for him to do that while women are exposing themselves while he is fully exposed. Well, they come in when he's -- the complaint alleged he tried to shield himself when there was no reasonable way to get around that.

THE COURT: Were there any stalls?

MR. SCHWARTZ: What?

THE COURT: Were there any stalls in the men's room?

MR. SCHWARTZ: There were four stalls in the men's room --

THE COURT: And how many men's restrooms?

MR. SCHWARTZ: What?

THE COURT: How many men's restrooms in the Stadium?

MR. SCHWARTZ: There are 36 men's restrooms in the Stadium. There were lines at each of the stalls, there were lines towards the stalls -- as a matter of fact, what the

Plaintiff did on that level, as alleged in our -- his first amended complaint, went to four separate and distinct restrooms on that level and they were the same situation. Is the Court arguing that the Plaintiff has the -- has the burden to go to every 36 of the restrooms in the stadium because they have inadequate facilities?

THE COURT: The Plaintiff has an obligation under deliberate indifference to state facts which allege deliberately indifferent to the serious medical needs of the Plaintiff.

MR. SCHWARTZ: Exactly, your Honor.

THE COURT: The Court finds that the allegations are insufficient.

MR. SCHWARTZ: Well, then maybe -- then the situation -- where the Plaintiff had this need. I think the Court -- I hope the Court will agree that if a person has a full bladder it is hard to hold it for four hours or three hours, or sometimes even more, and if the Plaintiff does not have an opportunity in this confined arena with 54,000 people in it, to relieve his bladder because there has been a violation of a law, because the City knows of the situation which exists, which causes other people to do that, then it is his burden to just live with that situation, as he's --

THE COURT: How is that any different at a Charger game or Padre game or any other Stadium event?

MR. SCHWARTZ: What was the first question, your Honor?

THE COURT: How is it any different at a Charger game, a Padre game or any other Stadium event?

MR. SCHWARTZ: That's an exact quote, your Honor.

THE COURT: And then how is it different at Balboa Park or on this -- Broadway?

MR. SCHWARTZ: Okay, let's talk about Balboa Park. There that's not a confined arena -- they have 50,000 people 40,000 people at Balboa Park on Broadway, and someone is standing by a wall urinating. How is that different? That's not in a confined arena, it's not what you purchased the ticket for, it's not what -- supposedly restrooms are made available. This is a citizen who paid his money, who arguably under the standard itself, does have a

THE COURT: How about -- how about in an airplane?

MR. SCHWARTZ: There are adequate facilities in airplanes, your Honor.

THE COURT: There's adequate facilities in an

airplane?

MR. SCHWARTZ: Well, if -- when an airplane is locked, can a woman enter at the same time? Can two people enter that confined stall? Here's a situation where you may have up to 50 or 100 people in this area. There are 12 -

THE COURT: I think you're mixing apples and oranges. In an airplane there is usually limited facilities -- yes, you can go into a stall, but yes, the Plaintiff could go into a stall, too.

MR. SCHWARTZ: All right. Your Honor, in this particular situation, there were stalls at which there were lines in each of the restrooms. He went to no less than four restrooms as alleged in our complaint. There were troughs. As we talked in the earlier proceeding these are not protected areas, they are long metal sinks which men just stand there and urinate. This is the environment which the City has created for the facility.

Now, you look into the women's restrooms. All of them have stalls -- sometimes eight to nine stalls. It takes a much longer period of time. The women have gone into that situation because there is an availability using those troughs. While it may be unsanitary, which is probably -- or it might be obscene, it may even be disgusting to some people, and as the

case law says, "Shocking degeneracy" and to use -- I would like to bring the Court's attention to the citation, I think that it was in Smada (phonetic). It was Smada that people were citing People v. Young -- parents would not rest secure that their youngsters could use such facilities without the fear that they would witness scenes of shocking adult degeneracy.

THE COURT: Don't you think it's a difference with a minor versus an adult man?

MR. SCHWARTZ:- Well, your Honor, then what is it that is preventing a minor who is allowed to attend a Stadium event --

THE COURT: Those aren't the facts here.

MR. SCHWARTZ: Well, the facts are there are inadequate facilities. There's a fact that how this individual was affected.

THE COURT: This was a night concert?

MR. SCHWARTZ: Yes, it was, your Honor.

THE COURT: Why didn't you sue Elton John and Billy Joel?

MR. SCHWARTZ: Well, Elton John -- we sued the promoter who was representing Elton John and Billy Joel -- I think if you go to that extent it is detracting from what the real issue is here. We find this to be very -- other people have

laughed, they think it's a joke. It is not, it is serious, your Honor. We are -- while people say, "Well, he couldn't pee. How dare that other women could come in and I would-- " Some men would say, "Hey, I welcome women to come in. Hey, baby, look at me". That's not the case. The case is Mr. Glaser, the case is inadequate facilities, the case is acknowledged by the City, the case is the City allowed it to continue, and the case is Mr. Glaser's damages.

Now, we have asked for nominal damages, your Honor. We're not saying his life was shattered, he was suffering and he suffered because his rights were taken away, because the City acted the way they did and there was absolutely no reason for that.

THE COURT: Let me hear from Service America.

MR. DASSOFF: Thank you, your Honor. I guess --

THE COURT: You will need to -- we're in recording equipment so you'll need to come over to the mike. What about his Addicus case?

MR. DASSOFF: I'm sorry?

THE COURT: What about his Addicus case on the state action?

MR. DASSOFF: First, your Honor, let me point out it's the only case which Plaintiff has cited and quoting from his brief on page 14, the case holds as follows:

> "Private persons jointly engaged with the state officials in the prohibited action are acting under color of law for purposes of the statute. It is enough that he is a willful participant in joint action with the state or its agents".

There are a number of elements that were satisfied in that case that are really briefly summarized or distilled in that quote, none of which were present here. It's the only case that's been cited by the Plaintiff that supports the action.

This Court could not have been more explicit on January 8th when it entered its order. one of the criticisms which I think was a focal point of the order was the lack of state action -- it wasn't pled. Plaintiff has done nothing to address that criticism in this case. It's clear from this quote -- Plaintiff's own case compels joint action -- you have to be jointly engaged. Service America is not in the business of

maintaining the men's restrooms at Jack Murphy Stadium. They have no responsibility for that, they are not in privity of contract, they have absolutely no obligation whatsoever to assure anyone that the mens or the ladies rooms in that facility are maintained in any particular way. My client doesn't condone, it doesn't encourage what happened but it wasn't a party to it. So in terms of the state action requirement, it doesn't even begin to meet the test that's been enunciated by any number of cases that we've cited in our brief.

With respect to the other issues that are raised, the -- you know -- the argument about duty is so attenuated, how can any of us ignore the common sense argument. All the Plaintiff had to do was wait in line for a stall. It might have taken a minute, it might have taken 15 minutes -- I don't think it would have taken more. I've been in that position as most of us probably have at one time or another there. That's ignored completely in the complaint -- that's a common sense argument that can't be ignored. I think that argument alone is sufficient to impose a hurdle on Plaintiff -- a factual hurdle that can't be overcome in this case.

With respect to the other arguments that were made, I don't think they are compelling. I think -- I think, unfortunately, because we've made a request for Rule 11

sanctions. It's one thing to be creative, it's one thing to be imaginative -- I would like to believe Plaintiff's counsel when he says this is not about humor, it's not about an unusual situation many people might find laughable. I think what's not laughable is that we're here a second time in court before your Honor facing essentially the exact same complaint that we were here on a couple of months ago. We're not looking at any substance factually or legally that distinguishes this first amended complaint from the earlier one.

THE COURT: You don't think the deliberate indifference, or you don't think it's deliberate indifference to the serious medical needs of the Plaintiff?

MR. DASSOFF: No. I -- I mean -- I find that argument an incredible bootstrap argument. I don't think that even begins to satisfy the test for medical indifference. That's not my client's obligation to satisfy. I don't think even if that were true it would help the Plaintiff sustain a cause of action against Service America, but --

THE COURT: How about danger creation? You still say there again he could just wait for a stall?

MR. DASSOFF: Absolutely. And I heard nothing from Plaintiff's counsel -- I've seen nothing in the complaint that defuses that argument. I mean, it's a very simple

-- but simple arguments are usually the most compelling. There's no way around that -- facts are stubborn things.

THE COURT: Let me hear from the City. I need to go to a meeting at five at 10 to.

MR. GORDON: I will be very brief, your Honor. I would suggest to this Court that the Plaintiff is asking this court to step into the political arena and resolve issues if there are any issues to be resolved that should properly be left to the political process.

But more importantly, Plaintiff has failed to establish through its allegations the two essential elements to maintain a Section 1983 action, namely, number one, that he was deprived of some federal constitutional right and number two, by -- under color of law or through state action.

What this case really boils down to, I think, is whether or not there is a constitution of duty under the due process clause of the 14th Amendment to provide adequate restroom facilities to immediately accommodate a sell out crowd at Jack Murphy Stadium. There's simply no constitution of duty -- the duty would arise in cases where the state or the city has deprived a person of his ability to take care of himself. The case cited by Plaintiff's counsel Cabrellas v. County of Los Angeles stands for just that proposition -- that's

a prisoner case where the state had arrested an individual, incarcerated him and then allegedly were deliberately indifferent to that prisoner's medical needs. The Ninth Circuit held that that did state a cause of action because this person had been taken into custody, could not provide for his own needs due to the fact that he was incarcerated, therefore, there was a duty on the part of the state to provide medical facilities -- so absent incarceration or restraint in some significant degree, somewhat akin to an incarceration, there is simply no duty to provide the medical needs or to protect people from being injured or killed by private citizens.

What we have here, if there was a deprivation of any right, it was done by or accomplished by private actors, namely, the individuals -- the women

-- who decided to go in the ments restroom. There is simply no state action in this case. It's a political issue that's involved in this case and I don't think this Court should consider or accept the Plaintiff's invitation to step into the political arena. But there is simply no cause of action stated under Section 1983.

THE COURT: All right, thank you. Counsel?

MS. SMITH: Your Honor, we join with the statements of counsel for the City and for Service America. The only other statement I have --

THE COURT: You're representing --

MS. SMITH: Bill Silva. The only other statement I have to make is regarding the USC 1983 claim against us and our position regarding that claim is very simple and straightforward. We are a private entity which was performing a public function. Merely renting a public facility does not constitute a state action for purposes of a constitutional civil rights claim. Thank you.

THE COURT: The Court having heard the argument of counsel before and the argument of counsel again on an amended complaint that's strikingly similar to the previously filed complaint in this action, the Court grants the 12(b)(6) motion. The Court will articulate in a memorandum decision the reasons more fully that the Court is granting the 12(b)(6) motion and given the Court's view that there are no set of facts that the Plaintiff could allege under these circumstances consistent with Rule 11 obligations that would create a federal cause of action, the Court grants the motion with prejudice.

First, on the 1983 claim, in order to have a federal claim there has to be a constitutional deprivation, and the Court finds the complaint allegations deficient in creating a constitutional allegation.

With respect to all Defendants, except the City

of San Diego, the Court believes that there has not been sufficient allegations of state action.

With respect to the City of San Diego, the Court previously articulated that under the 14th Amendment, invasion of privacy claim, that there was no reasonable expectation of privacy under the circumstances. Next, under the 1983 claim, the Plaintiff must allege that the challenged conduct was committed by a person acting under color of state law and that the conduct deprived the Plaintiff of a constitutional right. In this instance, violation of a municipal ordinance does not under these facts set forth deprivation of a federal constitutional right.

The Court finds that a claim -- attempted claim on two exceptions -- deliberate indifference, custodial care, special relationship, endanger creation, do not amount to a cause of action.

I do have to take the allegations as true but there is ample case law that indicates that the Court need not accept a cognizable -- the allegations of the Plaintiff's complaint, lack of cognizable legal theory or sufficient facts to support a cognizable legal theory.

If, as a matter of law, it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegation, a claim must be dismissed

without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one.

This complaint, as I've noted, is a near replica of the original complaint that the Court had previously dismissed.

On the deliberate indifference, the Court -- the Plaintiff suggested he had a special relationship with agents of the Defendant City, based on his confinement at the stadium during the concert. The Plaintiff's allegation failed to bring the Plaintiff within -- within the custodial care exception to Section 1983, nor do Plaintiff's allegations bring it within deliberate indifference to the serious medical needs of the Plaintiff. Plaintiff was not involuntarily committed to the stadium for the duration of the March evening and could have elected to use a stall.

On the danger creation, the Court also finds deficient Plaintiff's attempt to bring his case within the realm of the danger creation exception.

On a 12(b)(6) motion, the Court is under no obligation to necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations. Western Mining Council v. Watts 643 F.2d 618, Ninth Circuit (1981).

Plaintiff does not allege for purposes of the

exception that a state actor affirmatively placed him in a situation of danger that led or would reasonably lead to third party violence. See Wood v. Austrander 879 F.2d. 583, 588, Ninth Circuit (1989).

As to the request for Rule 11 sanctions as to Service America only -- the only one that has requested them -- if Service America wishes to pursue a request for a Rule 11 sanctions I'll have that separately noticed and separately briefed by the Plaintiff. If you decide -- elect to not pursue it, then -- I'll give you a motion date now and then you can decide whether you wish to pursue it or not.

MR. DASSOFF: Thank you very much.

THE COURT: For 28 days plus some additional time -- as I stated I'll put this in a memorandum decision. Plaintiff is free to pursue on the political front any arguments he wishes with respect to the restroom facilities situation at Jack Murphy Stadium, but the Court does not believe that he's set forth a cognizable legal theory to create a federal claim. Absent a federal claim the Court declines to exercise jurisdiction over his state law claims.

You could also appear telephonically if you wish. The acoustics are not as good for that, but are you coming from --

MR. DASSOFF: Orange County.

THE COURT: Orange County? It is possible. How long would it take you to separately brief the -- what I would need is your -- the actual hour amounts of time that you've spent.

MR. DASSOFF: No more than a few days, your Honor.

THE COURT: Okay. Howls May 13th and then you would have to provide 28 days' notice. Is that all right for you?

MR. DASSOFF: That would be fine, your Honor.

THE COURT: Okay.

MR. DASSOFF: Thank you. What time?

THE COURT: Oh, that's at 10:30.

MR. DASSOFF: All right. Your Honor, would that --

THE COURT: Is anybody else going to join in on that?

MR. GORDON: Yes, the City will. Would that date be equally applicable to the City?

THE COURT: Correct.

MS. SMITH: Your Honor, I'm not sure if Mr.

Ottilie would --

THE COURT: For some reason I see the City in a slightly different position than the lack of state action.

MS. SMITH: Yeah, I'm not sure if Mr. Ottilie would want to join in that or not.

THE COURT: Okay. If you do -- if anybody does, you need to file your brief sufficiently in advance of the hearing date so that we have 28 days notice to the Plaintiff and then you can respond. Thank you.

MR. DASSOFF: Thank you.

MR. GORDON: Thank you very much, your Honor.

MR. SCHWARTZ: Thank you.

(Proceedings concluded.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Adeline L. Carlson
Transcriber

4/18/96
Date

FEDERALLY CERTIFIED TRANSCRIPT
AUTHENTICATED BY:

/s/ L.L. Francisco
L. FRANCISCO, President
Echo Reporting, Inc.

[SEAL]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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| BOB GLASER,<br><br>Plaintiff,<br><br>vs.<br><br>CITY OF SAN DIEGO,<br><br>Defendant. | ) | Case No. 95-3632-H(BTM)<br><br>San Diego, California<br><br>Tuesday<br>January 2, 1996<br>10:35 a.m. |

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE MARILYN L. HUFF
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

JEFFREY S. SCHWARTZ, ESQ.
501 West Broadway, Suite 1700
San Diego, California 92101

For Defendant:

City of San Diego:
EUGENE P. GORDON, ESQ.
Chief Deputy City Attorney
1200 Third Avenue, Suite 1200
San Diego, California 92101

Transcript Ordered By:
JEFFREY S. SCHWARTZ, ESQ.

Court Recorder: Nancy Cablay
United States District Court
940 Front Street
San Diego, California 92189

Transcriber: Karen Johanson
Echo Reporting, Inc.
225 Broadway, Suite 350
San Diego, California 92101
(619) 238-5173

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

SAN DIEGO, CALIFORNIA

TUESDAY, JANUARY 2, 1996 10:35 A.M.

--Ooo--

(Call to order of the Court.)

MR. GORDON: Good morning, your Honor. Gene Gordon, City Attorney's office, on behalf of moving party, the Defendant, City of San Diego.

MR. SCHWARTZ: Good morning, your Honor. Jeff Schwartz on behalf of the Plaintiff, Bob Glaser.

THE COURT: Now, is anybody here from WJS, Bill Silva Presents?

MR. GORDON: Not to my knowledge.

THE COURT: Are they also submitting on the papers, do you know?

MR. GORDON: I have had no contact with them. I was not even aware that they had been served, so I can't answer that question.

MR. SCHWARTZ: As I understand, speaking to Mr. Ottily (phonetic), who represents Bill Silva Presents, he now has a motion on calendar for two weeks from today, the 16th of January -- a separate motion to dismiss.

THE COURT: And have you responded to that?

MR. SCHWARTZ: The response, your Honor, I understand is due today and we will submit a response today, depending on the results of this particular hearing, whether that is necessary, if at all.

THE COURT: Okay. All right, you may be heard.

(Pause.)

MR. SCHWARTZ: Prior to being heard, your Honor, if I may inquire if the Court has intention and if you'd like me to address certain specific points of the argument?

THE COURT: Here's the Court's concern. The Federal courts are courts of limited jurisdiction. While we have some discretion to entertain supplemental claims on state law matters, if it's at an early stage of the proceeding, absent a Federal claim, the Court would decline to get involved in the analysis of state law matters. And seeing the claim, the basic problem with -- with your allegations concerns whether there can be a 1983 claim on a constitutional right of privacy in a urinal, as you've alleged, without the constitutional claim, there we don't have a Federal prong to base the rest of the state claims on. And if you have a negligence cause of action, or some other cause of action, that can be dealt with in state court.

The main problem I see with the case, as alleged right now, is that there are an abundance of cases dealing with when there is and when there is not a problem with right of privacy.

If law enforcement, for example, can execute a search, and if there is no constitutional right of privacy or expectation of privacy, then how can you claim that

simply because somebody is at a urinal that there is a constitutional expectation of privacy. So you may wish to address that.

MR. SCHWARTZ: Thank you, your Honor. First, let's address the point of who is the Plaintiff. The Plaintiff is not a criminal. He's not arrested. He's not charged with anything. The Plaintiff is a patron at an event, which is owned and operated by the City of San Diego, therefore, satisfying the requirement to take action.

Plaintiff is now in a men's restroom with his genitalia exposed. This is a place which is designated on the property for men to urinate. This is a problem which the City of San Diego has known about prior, that women will invade the men's restroom, will use the men's restroom, and we have to address: does this Plaintiff have the expectation of privacy to expose his body?

THE COURT: Let's get back to the question that I asked before.

MR. SCHWARTZ: Sure.

THE COURT: If there's no reasonable expectation of privacy as a matter of law when law enforcement invade the stall, then how can there be a reasonable expectation of privacy when somebody who's not even in a stall is in a men's restroom?

MR. SCHWARTZ: The way the cases, to my understanding and as argued in the papers -- and,

specifically, I think the strongest case, which is a California case, Sepulveda v. Ramirez -- it says the right to bodily privacy is fundamental and at that time -- this is an agent, a parole officer, going into the stall to watch a woman urinate and the court did find that the woman, even under custody, did have that reasonable expectation of privacy.

And what we go for here is that the individual Plaintiff is not even in a position where his liberties are taken away. He's not under arrest. He's not convicted or anything. So, if, in fact, a-person in that situation, for a drug test, or for whatever reason, had the reasonable expectation of privacy, as interpreted by the courts, then clearly the Plaintiff who has no wrong -- no run-in with the law, is a law-abiding citizen, should not have a reasonable expectation of privacy does not follow logically.

Furthermore, the cases that -- I'll cite again Ingram v. Wright (phonetic), which is a United States Supreme Court -- it says intrusions on personal security falls within the constitutional privilege.

I think what we need to look at is the issue the Court has addressed: does this person have a reasonable expectation of privacy? The hypothetical question is begged here. If the woman is right there with her genitalia exposed on a trough, and a man walks in with his genitalia

exposed on a trough, are we to say that woman does not have a reasonable expectation of privacy?

THE COURT: Is she in a men's restroom or a woman's restroom?

MR. SCHWARTZ: Well, let's change it back. Let's put the woman in the woman's restroom.

THE COURT: If she's in a woman's restroom, then she's in a stall.

MR. SCHWARTZ: Then a man can walk in and expose his genitalia? This is what happened. A woman walked in and exposed her genitalia.

THE COURT: But we don't have those facts. We have the facts where he's at a urinal. He's going to be obviously exposed to other individuals, namely men, so the issue that you raise is whether the fact that he is being seen by women, who he elects not to sue, creates an obligation on the part of the City of San Diego, a constitutional violation.

MR. SCHWARTZ: That is correct, your Honor. While the Defendants in their opposition -- and the Court has stated today, "who Mr. Glaser elects not to sue", is the woman. The woman -- it would be almost completely and totally impossible for the woman to be sued since the City of San Diego did not enforce their obligations and Mr. Glaser is there with his penis exposed while the woman is urinating. Is he going to stop and run out and grab the

woman and say, "I'm going to sue you."

I think, while that hypothetical situation was posed in the pleadings and the Court brought it up here, that is not something we're concerned with.

This is an event which is owned and operated, run by the City of San Diego. San Diego requires the promoter to fill out a certain permit -- a permitting process. In that permitting process they require the promoter to provide safe and sanitary conditions, and especially when there's -- as the City of San Diego's own municipal code states, "Eminent possibility of violent or disorderly conduct."

And the facts that we have here are 54,000 individuals who are in a confined arena for at least four hours, listening to rock and roll music and here he's in a urinal, which he expects -- the men's urinal, clearly designated "men's urinal,', relieving himself. I think it's clear that he has this reasonable expectation to do that in public -- in private, at least what he understands. When you have a trough, he understands that there may be other men urinating at this trough. He's been a patron to the stadium.

I don't think the expectation is clear that he should expect and allow women to come in, expose themselves, and urinate right next to him. So the question is: is there a constitutional expectation? I argue substantially yes. I

think the case law, as argued in our papers, will confirm that.

THE COURT: Explain to me which of your cases do you think support the proposition that he has the reasonable expectation of privacy when he is going to be seen by other men.

MR. SCHWARTZ: Well, I will argue once again Sepulveda is the strongest case.

THE COURT: Under state law?

MR. SCHWARTZ: Yes, because this is an event -- the title of the venue is San Diego Jack Murphy Stadium. It's owned by the City of San Diego. It's governed by the City of San Diego. The City of San Diego regulates who can come in. The City of San Diego sets forth certain standards in which people can come in.

The City of San Diego posts signs of who can go in the restroom. The City of San Diego had police officers, agents of the city, patrolling the area. The police officers knew about the various codes and requirements for personal security.

So, while Mr. Glaser may have had his expectation of privacy, believing that other men would be there -- since it is a trough, or no stalls, per se -- and there are as much as 18 feet in some restrooms of men to men urinating. So maybe that would be his expectation for privacy. But nowhere does he have an expectation that

women are going to come in and expose themselves in front of him.

So, is the expectation of privacy evaded when a woman comes in and exposes herself and urinates in front -- and actually on one occasion actually next to the Plaintiff while he is exposed, while he is urinating. Is that a reasonable expectation of privacy? I think he should be protected from that.

And that's where the facts are different. He is not making a claim for other men urinating. That's an accepted fact, unfortunately, that there are troughs. Men have to accept that. Women don't accept it because there are no troughs in women's rooms. But men understand that other men will have their genitalia exposed line by line.

When they walk into a men's restroom, they do not expect a woman to walk into the restroom and a woman to urinate right in front of them while they also are exposed.

The human body -- and the case was cited in our papers -- is a fundamental privacy -- the human body.

THE COURT: You don't have a fundamental right to privacy to be able to go to the restroom when you please.

MR. SCHWARTZ: No, he was in a restroom, a men's restroom, and he was performing the function which was meant for it. He accepted that there was a

urinal. He used the urinal, a men's urinal. It didn't say "men's and women's". If, in fact, this was coed or unisex restrooms, we wouldn't be here today. But they are separate designated restrooms and the city knew there were separate designated restrooms and they went through a lot of procedures to see that the safety of those 54,000 people were protected. However, they were failed. It was failed since they allowed X number of women to be with X number of men in a limited number of restrooms.

This is not the first time it ever happened. This is the first time we're in court by this particular Plaintiff. The City has been on notice and it's documented clearly in their board of governor minutes. The board of governors of the stadium as early as 1985 knew there has been a problem with the ratio of men's to women's. As a matter of fact, in June of 1994, which is approximately nine months prior to this particular event, a resident of San Diego complained to the City and the manager stated that, "We are not going to have any more concerts until we've corrected this problem."

So, they clearly know this situation has existed -- it's not magical. It's not the first time it happened. It has happened and the City of San Diego has allowed it to continue to happen and Mr. Glaser finally has come up and said, "Hey, I am upset. I've been humiliated. I've been embarrassed."

THE COURT: Loss of earnings?

MR. SCHWARTZ: Well, there's two days. We are not going to assert something that's not there, your Honor. This individual has not gone to psycho therapy. This individual is not a fragile individual. But, clearly, he was upset. He was humiliated. He was embarrassed. As a citizen of the United States he's guaranteed the protection privileges.

And, once again, let me go back to the other hypothetical. If he walked into a women's restroom and exposed himself -- let's say he used the sink. For all intents and purposes, this woman used a sink, which is a trough. She exposed herself in open view of men -- in open view.

Are we supposed to say that it's okay for a man to do that, but it's not okay for a woman? So that's where my argument goes that he did have a reasonable expectation of privacy and it was violated by the acts of the City of San Diego.

THE COURT: All right, let me hear from the City. (Pause.)

MR. GORDON: Your Honor, I think this is a case where the Plaintiff is trying to make a Federal question out of an incident where, if he has any regress at all, it's against the particular private individuals, not state agents, but private individuals who may have caused this Plaintiff

emotional distress.

Section 1983 -- and we're really talking about whether or not there's a Federal issue that's involved in this case. We don't believe that there is.

Section 1983 requires that the Plaintiff be able to allege that in this case the City caused Plaintiff to be subjected to the deprivation of some constitutional right, or right guaranteed to him by Federal law.

The City did not violate any of the Plaintiff's alleged constitutional rights.

THE COURT: Had there been a rape in a women's restroom, certainly you would be facing a lawsuit by -- by the victim.

MR. GORDON: Probably, only because there's a serious injury alleged, but that's -- that's a far cry from saying that there's any substantive liability on the part of the City of San Diego.

It's clear under Federal cases, starting with the Dushany (phonetic) case, decided by the U.S. Supreme Court, that there's no constitutionally-imposed affirmative duty on the part of state agents to protect citizens from misconduct by other citizens.

It's only when the state agent, him or herself, brings about a constitutional violation -- what we have here, allegedly, is inaction on the part of the City, and inaction on the part of the police officers to prevent women from

going into the men's restrooms.

Inaction by itself is not enough to establish a Federal question under the Dushany case. We don't have in this case allegations that City police officers,, or any member of the City directed women to go into the restrooms. There's no allegations that women's restrooms were .unavailable, were closed to women. Simply, there's no state action.

But, more importantly --

THE COURT: Wouldn't they have the same argument -- let's say that the stadium has a history of rapes in the women's restroom and has had complaints before about security. You would be making the same argument, "The City police officers didn't direct the rapist to go into the women's restroom", nevertheless, let's assume a rape occurred.

I think that Plaintiff's position would be that if it was a woman who was in the circumstance would the Court treat her case differently?

MR. GORDON: Well, I think under the law the ruling ought to be the same, that there's no constitutionally-imposed duty on the part of the state to protect other individuals from harm by other private individuals.

I think the outcome would be the same, whether it's a rape, whether it's an assault, whether it's a robbery, or

whether in this case there's an emotional distress. I think the outcome would be the same, unless it could be established that the City in some way caused that rape to occur.

Now, the mere fact that the incident occurred on City property, be it on a City street, Balboa Park, or the stadium, doesn't make any difference because Dushany basically says that there's a requirement that the incident be caused by some constitutional misconduct by some City official.

Whether it's a rape or anything else, I would submit to the Court that the outcome ought to be the same.

But in this case we don't even have a constitutional right that's implicated.

THE COURT: So you're saying that, one, he hasn't stated a Monel (phonetic) claim, no policy violation, and, two, he hasn't stated a constitutional claim, period?

MR. GORDON: That's correct on both counts. There's been no showing -- well, there has -- before you get to Monel, there has to be a showing that there's an underlying constitutional violation. There's simply no constitutional violation in this case.

What we have here are private individuals, namely females who, for whatever reason, are choosing to use the men's restrooms. These are private actors, not state actors. They're going into an area, not a stall like in Sepulveda.

Sepulveda is distinguishable in the facts. But they're going into an area that is common to all the other men, basically a common area where the Plaintiff is aware there are other people about.

Under those circumstances, while he might subjectively in his own mind entertain the expectation that women will not come in, the bottom line gut issue is whether or not that subjective expectation of women will not come in is a right that should be guaranteed to him by the constitution.

Or, to put it another way, is it a reasonable expectation of privacy that society is willing to give this person under the constitution? And I would submit that under the circumstances as alleged in this case, there's simply no reasonable expectation of privacy for this Court to protect.

So, there's no underlying constitutional violation. There's no City policy. There's no -- the City didn't do anything that brought about this alleged constitutional violation -- simply no state action, no City action, which brought about what occurred in this case.

THE COURT: Shouldn't the City, when they're having an event, make sure that, for security and health and safety reasons, that there are sufficient restrooms available for the public?

MR. GORDON: Probably. I think that would be

a very good idea and I think the City is undertaking that effort. But the question before the Court this morning is whether or not alleged failure on the part of the City to make sure that there were more women's restrooms resulted in a violation of the Plaintiff's constitutional rights and the answer is simply no.

THE COURT: Counsel, do you want to respond?

MR. SCHWARTZ: Yes, thank you, your Honor. First, I want to state where we are at this point in time. It's the pleading stage. The allegations set forth in the complaint I will not go over. The Court has had an opportunity to read that. The Court has read the papers.

Let me do respond to the argument of the City here. There is no serious injury alleged.

THE COURT: I can't judge that because that would be judging -- I have to take the facts pled in the light most favorable to the non-moving party. You've alleged that there has been injury. I have to assume that there has been injury.

MR. SCHWARTZ: Number two, this is not a mere fact in an isolated incident. we have alleged on a number of occasions this is a situation which has occurred over and over and over again. This is a situation which the City has allowed to continue.

There is case law which we have stated in our pleadings and we've alleged in facts in our complaint.

When a state actor, i.e. the City of San Diego, Jack Murphy Stadium, places individuals in a position which is more hazardous -- and our contention is that here they are put in a confined area, four hours. They have paid and they're going to attend an event.

The City of San Diego allows concessionaires to sell beverages, beverages which would cause an individual to use a restroom. They know that there is inadequate space. Does that increase the danger of this particular Plaintiff? Does that put him at more of a hazard?

The Court has inquired of both counsel the very scenarios -- is he entitled to a reasonable expectation of privacy? This is not an isolated incident. It's an incident that's maybe before the Court for the first time, but clearly -- clearly, the Plaintiff does have that expectation to urinate, a safe and health -- bodily function, in what he knows is a men's restroom. It doesn't say, "Women come in here."

As a matter of fact, as alleged in the complaint when he saw women in there he had difficulty performing that function. He had to hide himself. He had to move to the side. He actually took measures to speak to the private security which is allowed by the permit of the City of San Diego -- actual City employees who are on the premise for that particular purpose -- more notice to the state actor, the City, that he is unable to perform a bodily function, which

I think he should be entitled to do, in that women are watching him and women are exposed in front of him.

So, I think, based on the complaint alleged, the papers submitted and argument today, there has been showing that Plaintiff does have a claim on the basis of 1983. However, if the Court does not so find that, we request the Plaintiff should be granted leave to amend and, as the Court knows, under 15(a) that is freely given and Bank v. Pitt (phonetic) said we should be at least given one more chance. Thank you.

THE COURT: On October 31, 1995, Plaintiff filed with the Court a complaint for injunctive relief, declaratory relief, and damages stemming from an alleged incident in which female concert goers shared Plaintiff's urinal.

According to the allegations in Plaintiff's complaint, Plaintiff attended a concert at Jack Murphy Stadium in San Diego and was confronted by the presence of women while urinating in a trough in one of the men's restrooms. Plaintiff's complaint, paragraph 3.

Plaintiff's complaint charges several Defendants with violation of his Federal and state rights.

Defendant, the City of San Diego, now moves the Court to dismiss the action for failure to state a claim upon which relief may be granted. Federal Rules of Civil Procedure, 12(b)(6).

After reviewing the matter, the Court will make a ruling on this motion. First of all, this is not about the City of San Diego encouraging men and women to share each other's restrooms.

The City of San Diego should enforce its ordinance and the City of San Diego should take steps to make sure that men go to the men's restroom and women go to the women's restroom.

However, at the same time we've all heard the expression, "Don"t make a Federal case out of it." Absent a Federal claim at this early stage of the proceeding, the Court would decline to entertain the numerous state law claims: negligence, nuisance, the others that are alleged. We need to have a Federal right that brings the Plaintiff into the Federal court.

Plaintiff can go one of two ways. one, if there is diversity between the Plaintiff being a citizen of one state and the Defendant being a citizen of another state, then there is diversity jurisdiction and the case could be brought in this Court. We don't have that here. Plaintiff is a citizen of the state of California. He's suing the City of San Diego. So we don't have diversity jurisdiction.

The only issue is a legal issue and that is the legal issue: does he state a claim under 42 USC section 1983, or discrimination under 42 USC section 2000(a), or violation of the Fourteenth Amendment's assurances of personal

security and privacy?

If he does not fall into one of these constitutional claims, then the Court would dismiss the case without prejudice. He could then e'ect either to amend here in Federal court to attempt to bolster his allegations, or sue in state court on his state law theories.

Because Plaintiff has initiated his action here in Federal court in the first instance, the Court first examines Plaintiff's Federal claims on Defendant's motion to dismiss, under 28 USC section 1367(c)(3).

Plaintiff is correct. On a motion to dismiss the Court is obligated to accept the allegations as true, under Federal Rule of Civil Procedure 12(b)(6).

A court may grant a rule 12(b)(6) dismissal, however, where there is either a lack of a cognizable legal theory, or the absence of sufficient facts alleged under a cognizable theory. Ballestreri v. Pacifica Police Department, 901 F.2d 696 at 699, Ninth Circuit (1990).

At the outset, the Court observes from the pleadings that at no time did Plaintiff opt to use a private bathroom stall, but instead Plaintiff alleges in his complaint, paragraph 3, 14, and 16, that he urinated at a self-described trough.

The Court also notes that the Plaintiff has alleged that he continued to purchase and consume beer. Plaintiff's complaint, paragraphs 20, 28, 34, and 36.

After evaluating the law, the Court finds under the facts as alleged Plaintiff fails to state a claim under 42 USC 1983, which requires that the challenged conduct arise from state action. Shelly v. Kramer (phonetic), 334 U.S. 1 (1948), National College Athletic Association v. Tarkian (phonetic), 488 U.S. 187 (1988), Wyatt v. Cole (phonetic), 504 U.S. 158 (1992).

The City did not affirmatively place the women in the men's restroom, nor did the City affirmatively direct them there. The actions of private actors, the women, do not qualify for 1983 relief; however, he could sue them in state court.

Mere negligence on the part of the state actor is no basis for a 1983 claim. Davidson v. Cannon (phonetic) 474 U.S. 344, 347 to 48 (1986), Barunda v. Richmond (phonetic), 885 F.2d 1384 at 1391, Ninth Circuit (1988).

While it is true in certain circumstances, with sufficient allegations, inaction could result in a 1983 claim. For example, the Court has given the illustration in oral argument of the situation where there was a rape. If there was prior notice to the parties, and if there were sufficient allegations of a reasonable expectation of privacy, then the Court could entertain the claim.

I am not making this ruling distinguishing between men and women, and I wish to emphasize that point. The issue here is one that is based in the facts and the law. The

facts as alleged is that the Plaintiff elected to be in front of a urinal, was not in a private stall.

The Court finds under the case authority that there is no reasonable expectation of privacy for the Plaintiff under those circumstances. It is a given that he would be seen by other men. So, the fact that he is seen by women is unfortunate for him; however, it does not state a Federal claim.

Plaintiff also fails to state a claim under 42 USC section 2000(a) for discrimination at a place of public accommodation. Restrooms accommodating each gender were provided, were available, and were open on the night of the concert. That women chose to utilize male facilities does not implicate any of the named Defendants. Plaintiff also fails to allege any discriminatory acts that would give rise to liability under this statute.

In addition, Plaintiff fails to state a claim under the Fourteenth Amendment. There is no constitutional right of privacy regarding activities exposed to public view. Katz v. United States (phonetic), 389 U.S. 347 (1987).

Two requirements are necessary for Plaintiff to have a legitimate expectation of privacy. First, a person must have a subjective expectation of privacy and, second, the expectation must be one that society recognizes as reasonable. Katz at page 361.

The Court repeats that Plaintiff was using a urinal,

or trough, as alleged in Plaintiff's complaint. Complaint, paragraph 3.

Under the facts set forth in Plaintiff's complaint, Plaintiff could not have an actual or reasonable expectation of privacy. As the Seventh Circuit put it in Dimeo v. Griffin (phonetic), 943 F.2d 679 at 682, Seventh Circuit (1991):

> "Urination is for most men not highly private. Men urinate side by side in public restrooms without embarrassment, even though there is usually verylittle, and often no attempt to partition the urinals."

Furthermore, society is not prepared to recognize Plaintiff's personal expectations of privacy in this context. In Smada v. United States (phonetic), 352 F.2d 251, Ninth Circuit (1965), cert denied 382 U.S. 981 (1966), the Supreme Court upheld a decision that rejected the argument that an occupant of an enclosed public stall had a reasonable expectation of privacy.

As the Ninth Circuit explained:

> "A great deal of privacy is taken out of these toilet stalls by the fact that they're wide open for three feet at the top and they're wide open for approximately 18 inches at the bottom. They are almost public."

That's at page 254.

In light of the Ninth Circuit's holding on the limited privacy right afforded to occupants of enclosed stalls, the Court rejects Plaintiff's expectation of privacy at a urinal which is deemed a trough.

Finally, Plaintiff's Fourteenth Amendment personal security claim fails. The due process clause of that amendment provides that a state shall not deprive any person of life, liberty, or property without due process of law.

The constitution does not grant Plaintiff a Fourteenth Amendment liberty interest to be protected by state from private intrusions upon his alleged personal security under the facts as alleged.

The Court finds that Plaintiff has vastly misunderstood the parameters of the due process clause, which serves to protect the people from the state, not to ensure that the state protects them from each other. Dushany v. Winebago County Department of Social Services.(phonetic), 489 U.S. 189 (1989).

The Court finally notes that many of Plaintiff's state claims for nuisance, dangerous condition, premises liability, negligence, and breach of contract could be alleged in state court.

The Court on this motion reaches only those claims. that purport to create Federal jurisdiction; namely, the 1983 claim, the public discrimination of

accommodations claim, and the due process claim.

Plaintiff insists that a valid City ordinance was violated and went unenforced. Plaintiff's amendment memorandum of points and authorities at page 3.

The Court emphasizes that breach of a local ordinance is not necessarily of constitutional magnitude.

Plaintiff asks that the Court allow Plaintiff to amend his complaint. On the standards for amendment, the Court is required to grant leave to amend if there is any set of facts that could theoretically support the claim.

The Court will caution Plaintiff that Plaintiff has Rule 11 obligations. He may elect strategically to sue in state court rather than in Federal court if he feels that his state law claims have merit.

If he wishes to proceed in Federal court, the Court will allow Plaintiff one more opportunity to remedy his complaint. The Court grants Plaintiff 30 days leave from the date of this signed order to cure the deficiencies contained in the complaint.

Federal Rule of Civil Procedure 15(a) provides that leave to amend shall be freely given. However, the Court cautions Plaintiff and his counsel to carefully examine the legal merit of any claim submitted to this Court. In this regard the Court refers Plaintiff to Federal Rule of Civil Procedure 11(b), which provides:

"By presenting to the Court, whether by

> signing, filing, submitting, or later advocating a pleading, written motion, or other paper, an attorney is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, it is not being presented for any improper purpose, such as to harass or cause unnecessary delay, or needless increase in the cost of litigation, and the claims, defenses, and other legal contentions therein are warranted by existing law, or by a non-frivolous argument for the extension, modification, or reversal of existing Law, or the establishment of new law."

In the event that the Court determines that Rule 11 has been violated, the Court may impose an appropriate sanction, as provided under the rules.

Having reviewed the record and entertained oral argument, the Court grants without prejudice the City of San Diego's motion to dismiss the complaint for failure to state a claim upon which relief may be granted. The Court further grants Plaintiff -30 days leave to amend.

If there is no amendment and the parties wish to dismiss without prejudice and file over in state court, you should let the Court know of that by a signed pleading.

If there is no amended pleading filed within 30 days, then the Court will dismiss the action as to the City of San Diego, with prejudice.

The Court also cautions that in light of this ruling, you should examine your options as to the other Defendants that may have motions pending.

We're in recess.

(Proceedings concluded at 11:10 a.m.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Karen Johanson
Transcriber

1-16-96
Date

/s/ L.L. Francisco
L.L. Francisco, President
Echo Reporting, Inc.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

| | | |
|---|---|---|
| BOB GLASER, Plaintiff, | ) | Case No. 95-3632-H Civil |
| vs. | ) | |
| CITY OF SAN DIEGO, | ) | |
| Defendants. | ) | |

TRANSCRIPT OF TELEPHONIC STATUS HEARING
Held in San Diego, California
September 12, 1996

BEFORE THE HONORABLE MARILYN L. HUFF

Echo Reporting, Inc.
225 Broadway, Suite 350
San Diego, California 92101
(619) 238-5173

[SEAL]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

| | | |
|---|---|---|
| BOB GLASER, Plaintiff, | ) | Case No. 95-3632-H(AJB) |
| vs. | ) | San Diego, California |
| CITY OF SAN DIEGO, | ) | Thursday |
| | ) | September 12, 1996 |
| | ) | 10:30 a.m. |
| Defendant. | ) | |

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE MARILYN L. HUFF
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: JEFFREY S. SCHWARTZ, ESQ.
501 West Broadway, Suite 1700
San Diego, California 92101

For Defendant City of San Diego: EUGENE P. GORDON, ESQ.
GLENN DASSOFF, ESQ.

Transcript Ordered By:
JEFFREY S. SCHWARTZ, ESQ.

Court Recorder: Nancy Cablay
United States District Court
880 Front Street
San Diego, California 92189

Transciber: Karen Johanson
Echo Reporting, Inc.
225 Broadway, Suite 350
San Diego, California 92101
(619) 238-5173

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

SAN DIEGO, CALIFORNIA THURSDAY, SEPTEMBER 12, 1996 10:30 A.M.

--Ooo—

(Call to order of the Court.)

THE COURT: Good morning. This is in the Glaser matter and this is being telephonically recorded.

I wanted to check with the parties and arrange for this status conference. one of the parties called up in my court about a week or so ago and asked about the status of the order setting the amount of sanctions and we were surprised, since I had done that early August.

So, what we did was then check in our -- we're doing a new automation with the clerk's office and so we checked into the status of the order going out with the clerk's office. And then we also called the other parties to see if other People had not received it. Because typically it's supposed to, within 24 hours of the date that it's filed, be sent out. And we're switching over from mailing out all orders to fax mailing orders.

And so I was chagrined to find out that we can't verify for sure, based on the records of our court -- I'm not convinced with 100 percent certainty that it went out timely and it's rather curious that all three of you did not receive it until recently.

And, then, further, because we have a 30-day time frame for potential action, I don't want anybody to be

prejudiced by that.

So, can you tell me just for my -- so that I can track this down a little bit more on our court end to try to improve our filing system in sending out orders and the faxing process, did any of you receive it by fax? And tell me your name before you speak.

MR. SCHWARTZ: None as to the Plaintiff, your Honor.

THE COURT: You did not?

MR. SCHWARTZ: Plaintiff did not.

THE COURT: Do you have a fax number?

MR. SCHWARTZ: We do.

THE COURT: And even the order that you received recently -- how did you get that one?

MR. SCHWARTZ: We received that through the mail, your Honor.

THE COURT: Okay. And you got that September 7th?

MR. SCHWARTZ: That was postmarked on the 5th of September.

THE COURT: It was postmarked on the 5th of September?

MR. SCHWARTZ: Yes.

THE COURT: Okay. And that's Mr. Schwartz?

MR. SCHWARTZ: That's correct, your Honor.

THE COURT: Okay. Mr. Gordon?

MR. GORDON: We did not receive it by fax, and I believe we received the order by mail on September 6th.

THE COURT: By mail on September 6th, okay. And, Mr. Dassoff?

MR. DASSOFF: Mr. Dassoff. We did not receive it, your Honor, through the fax. We did receive it through the mail after my associate, Angela Brown, called, I believe, your clerk. And I think we received it late last week or early this week.

THE COURT: My secretary. And when did she call? Do you know for sure on that? Last week?

MR. DASSOFF: Last Thursday.

THE COURT: And then you got it after that?

MR. DASSOFF: Yes.

THE COURT: I see. Now, have each of you registered with the Court your fax number?

MR. GORDON: Your Honor, I don't believe that

the city has.

MR. SCHWARTZ: I don't believe the Plaintiff has, your Honor.

MR. DASSOFF: And I don't believe we have either, your Honor.

THE COURT: What I'll do -- I'm not sure if you're required to do that or not. That's just for our overall -- since we're doing this fax service. I'll have to check a little bit more into if you are required to take any action or whether the clerk's office is supposed to find out a fax number and then use your fax number.

In any event, I apologize on behalf of the Court and I don't want anybody to be prejudiced by that. So, what I am going to do is extend the time of the order 30 days from today.

MR. SCHWARTZ: Your Honor, may I inquire, since we are all together?

THE COURT: Yes.

MR. SCHWARTZ: You stated in the body of your order that within 30 days from today the sanctions would be waived if the dismissal with prejudice is filed.

Now, my understanding of the Court's order in granting the ten-day -- excuse me, 12(b)(6) motion, is, in effect, a dismissal with prejudice of this case, and that's what the Court did.

THE COURT: Yeah, but you've appealed.

MR. SCHWARTZ: I see. For clarification, you are requesting that the appeal be dismissed?

THE COURT: See, here's the issue. I can't -- you can't file a -- if you have appealed -- you're free to appeal and if you think that the Court is in error I'm not in any way trying to have the parties not exercise their appellate rights.

But if you, on the other hand, want you and your client to make a strategic decision that you would rather not risk having the appellate court affirm the sanctions in

the amount, or any other amount, then that's something for your to decide together with you and your client.

So, I'm not in any way trying to make you waive any appellate right. But if you I do think that one of the purposes of sanctions is to especially in this case, is to try to reduce time and cost. And so I think it's perfectly consistent with the philosophy of rule 11 that if the other parties aren't going to have to spend time and effort doing an appeal, the appellate court won't have to spend time and effort doing an appeal and review of the order, and the case is over and done with, well, then I don't see -- I'm willing to then waive any amount of sanctions.

If you don't, if you want to exercise your rights, that's fine. Then the other parties and you can brief any and all issues to the appellate court and we do have the appellate process. Does that clarify it?

MR. GORDON: Your Honor, Gene Gordon for the city. I understand. Now, is there a time period within

which the Plaintiff could exercise his prerogative and dismiss the appeal? And the reason why I ask that question is the Defendant -- or the appellee's briefs are due before the Ninth Circuit by October 3rd and we're in the process right now of preparing the briefs. So what time period would the Plaintiff have to exercise their discretion?

THE COURT: Thirty days.

MR. GORDON: From today, right?

THE COURT: From today.

MR. GORDON: And that would be after the

THE COURT: Oh, that would be after your briefs are due.

MR. GORDON: Right.

THE COURT: Well, maybe you could contact the Court of Appeals and ask for a stipulated extension of that.

MR. GORDON: Mr. Schwartz, are you willing to stipulate to an extension?

MR. SCHWARTZ: Mr. Gordon, with all due respect, and Mr. Dassoff, at this point, without conferring with my client, I do not have the authority. I will represent on the record that I will confer with my client with regards to that.

THE COURT: Then I need to also say -- this is why -- you can't just -- once you've appealed, you can't just file a dismissal in the District Court. You have to notify the -- there's a procedure for dismissing a case that's on appeal and you would have to follow that procedure and then notify this Court that it's over.

MR. DASSOFF: Understood. As the Court has referenced in her order and is aware basically by the statement of Mr. Gordon, the Plaintiff has appealed, the brief has been submitted, and the responding brief is due -- you said the 3rd of October?

MR. GORDON: Yes.

MR. DASSOFF: okay.

THE COURT: So, on that what you'd have to do is contact the appellate court if you wanted to -- and even, I guess, Mr. Gordon, on your side you can decide whether you want to contact the appellate court and see if you need to -- if there's a way for you to unilaterally ask for 30 extra days and probably put in a declaration that the -- but this is a collateral matter that the Court has given additional time on this.

MR. SCHWARTZ: Right. This is not on the underlying action. This is strictly as to sanctions. And then Plaintiff -- I mean, Plaintiff also has appellate rights on this order.

THE COURT: Yeah, but what I'm saying is, the philosophy -- I've already ruled that I thought it was frivolous.

MR. SCHWARTZ: Yes.

THE COURT: You have full rights to challenge the basis for the Court's ruling. That's what the appellate court

is there for and I fully encourage you to exercise your appellate rights.

If you want to minimize the potential of sanction and wish to dismiss the appeal, then this Court would waive the sanctions.

MR. SCHWARTZ: I see. And Plaintiff has 30 days from today's date to make that decision, or to do that.

THE COURT: Right, but at the same time, to the extent that -- yes, because I still think, even if -- if it's so frivolous the appellate brief's already done and then the case is over. It's over and done, gone.

MR. SCHWARTZ: Right.

THE COURT: If you together or separately can ask the appellate court for an extension, that's an appellate matter and that's not my province. So, how you would go about doing that, you would have to contact -- you would have to figure that out on your own.

MR. GORDON: It the Court of Appeals declined

to give the Defendants an additional 30 days, the appellee's briefs are due October 3rd, then theoretically Plaintiff on October 4th could go ahead and accept this Court's offer and dismiss the appeal.

THE COURT: That's correct. And what I say is that's consistent with -- first, it was the Court's error in not getting this out -- a clerical error -- and the parties all agree that nobody received it until last week. And my intent was to give the parties 30 days to contemplate it -- the Plaintiff. And so I think, in fairness, that will be the order that the Court enters.

MR. GORDON: Okay.

THE COURT: And the benefit -- as I say, the benefit to all parties is then the case is over and done with. If the Plaintiff feels that as a matter of principle or legal ruling or otherwise he wishes to proceed with the appeal, that's perfectly proper and permissible and he can do that.

MR. GORDON: Okay.

(Pause.)

THE COURT: Now, if you wish on your own to go to the appellate court and say, "We'd like 30 days because there -- because this brief may not be necessary", or for whatever reason, you're free to do that, either jointly, by stipulation of the parties, even a stipulation to extend time.

The court may say, "No, we want the briefs on time."

MR. GORDON: Right.

THE COURT: Or, they may say, "Yes, 30 days." Or they may say, on a motion of one side or two sides, "Sure, let's give you 30 days and see what happens."

MR. DASSOFF: My whole point is it would just be a wasted effort and time and resources for the Defendants to file their briefs and then the day after they're filed the Plaintiff just goes ahead and dismisses.

THE COURT: But, see, now, you could bring that to the -- I guess there's nothing wrong in bringing that to

the attention of the appellate court and asking for a 30-day extension of time.

MR. DASSOFF: That would be the basis for the request.

THE COURT: Sure.

MR. DASSOFF: And we will certainly do that.

MR. SCHWARTZ: Well, where it would be fruitless for the Defendant, as the Defendants have realized, Plaintiff has expended an extraordinary amount of time in the briefing process and did comply with the appellate court's briefing schedule. So, I mean, that work has been done and the Plaintiff did have a good faith reason for believing that an appeal was appropriate. And the Judge has already addressed that.

THE COURT: Right. Well, you don't have to -- I mean, you don't have to dismiss the case at all. You can go up on appeal and they can ask for further sanctions on appeal. And you can run the risk with the Ninth Circuit

that they can cross appeal, if they wish, and say on the amount of sanctions that it should be the full amount or it should be -- or they can ask for sanctions on appeal. Those are all matters that are not before me.

MR. SCHWARTZ: Yeah, well, the same thing the Ninth Circuit can make a determination that the District Court had an improper ruling on the same level.

THE COURT: Sure. All I'm saying is that because you didn't get the order, I'll grant 30 days from today for you, and I'll send out an order to you. And why don't you give us your fax -- oh, they're on there. On the fax you have to sign up.

MR. GORDON: The city could sign up to receive all orders from the Federal Court by fax, I suppose, then, right? We just sign up one time?

THE COURT: Well, I'm not going to say.

MR. GORDON: Okay.

THE COURT: You'll need to -- that's -- you'll need

to check with the clerk's office on how to do that, but you should check into that because there are some procedures that the clerk's office has, and if you want to make sure that you are properly and timely getting the orders, you'll need to make sure that you on your end have complied with all the procedures.

But it's clear in this instance nobody got this order on October -- on August 10th, 11th, 12th, or 13th, and so the Court will extend the time 30 days. And then I'll leave it to the parties what you want to do with it.

MR. GORDON: Thank you, your Honor.

MR. DASSOFF: Fine.

MR. SCHWARTZ: Thank you, your Honor.

THE COURT: All right. Now, can you just give me -- what I'll do is fax out an order to you. So could each of you give me your fax number?

MR. SCHWARTZ: Yes, the Plaintiff's fax number is 232-3839.

MR. GORDON: The city's fax number is 533-5847.

MR. DASSOFF: And Paul Hastings' fax number is (714) 979-1921.

THE COURT: Thank you.

(Proceedings concluded.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Karen Johanson
Transcriber

2/24/97
Date

/s/ L.L. Francisco
L.L. Francisco, President
Echo Reporting, Inc.

[SEAL]

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF CALIFORNIA**

| | | |
|---|---|---|
| BOB GLASER, | ) | CASE NO. CV 95-3632 H (AJB) |
| Plaintiff, | ) | (Filed September 16, 1996) |
| vs. | ) | **ORDER EXTENDING TIME** |
| CITY OF SAN DIEGO, WJS III, INC. dba BILL SILVA PRESENTS, STAFFPRO SERVICES, INC.; SERVICE AMERICA; ACE PARKING, INC., and DOES 1 through 100, inclusive, | ) | |
| Defendant. | ) | |

On August 9, 1996 this court issued an Order Setting Sanctions Amount; Denying Plaintiff's motion to Amend

pursuant to Rule 52(b); and Denying Motion for Reconsideration. Although plaintiff was sanctioned pursuant to Rule 11, the court stated that if plaintiff elected to dismiss the case in its entirety within the next thirty days, the sanctions would be waived.

However, due to a filing error, counsel for plaintiff did not receive this order until September 6, 1996. As such, the court extended the plaintiff's time period for determining whether to dismiss the case in its entirety until October 15, 1996. Therefore, if plaintiff elects to file the appropriate documents to result in a dismissal with prejudice by October 15, 1996, the court will waive the sanctions.

The court emphasizes that it is in no way attempting to deter any party from exercising its full appellate rights. The court additionally notes that nay and all appellate procedural issues, including filing due dates, need to be raised before the United States Court of Appeals for the Ninth Circuit.

IT IS SO ORDERED.

DATED: 9/13/96

/s/ Marilyn L. Huff
MARILYN L. HUFF, JUDGE
UNITED STATES DISTRICT COURT

[SEAL]

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| BOB GLASER,<br><br>Plaintiff-Appellant,<br><br>vs.<br><br>CITY OF SAN DIEGO; WJSIII INC., dba Bill Silva Presents,<br><br>Defendants-cross-defendants-Appellees,<br><br>STAFFPRO SERVICES INC.,<br><br>Defendant-cross-claimant-Appellee,<br><br>SERVICE AMERICA; ACE PARKING INC.; DOES 1 through 100, inclusive,<br><br>Defendants-Appelles<br><br>vs.<br><br>Does 1 through 20, inclusive<br><br>Cross-defendant-Appellee. | ) | No. 97-55476<br><br>D.C. No.<br>CV-95-03632-MLH<br><br>(Filed May 8, 1998)<br><br>ORDER |

Before: BRUNETTI, THOMPSON, and T.G. NELSON, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
95 Seventh Street, P. 0. Box 193939
San Francisco, CA 94119-3939

August 7, 1997

CA No. 97-55476 Glaser V. City of San Diego

To All Parties:

The United States Court of Appeals for the Ninth Circuit is considering submission of your case without oral argument. You have ten (10) days from the date of this letter to present a statement setting forth the reasons why oral argument should be heard in this case. See 9th Cir. R. 34-4. Please send an original and three (3) copies of your statement to Clerk's Office in San Francisco, and show proof of service to opposing counsel.

The court welcomes additional citations, without argument, of relevant decisions rendered since the filing of a

party's last brief. See Fed. R. App. P. 28(j). Send an original and three (3) legible copies to the Clerk's Office, on letter size paper, with proof of service on all parties.

Very truly yours,

Cathy A. Catterson
Clerk of Court

/s/ Tim Hom
By: Tim Hom
Deputy Clerk

UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT
P.O. BOX 193939
SAN FRANCISCO, CALIFORNIA 94119-1939

October 20, 1997

In re: 97-55476 Glaser v. San Diego

Recently you received notice that the United States Court of Appeals was considering submitting your case without oral argument. That notice reflected the tentative assignment of your case to a panel of the Court assigned to decide cases without oral argument.

Upon further consideration, the Court has decided that your case should be reassigned to an oral argument panel. Although in most instances a reassigned case will receive oral argument, the panel of judges to whom the case will be assigned has discretion to order the case submitted on the briefs without oral argument. When the time and place for argument

before or submission to an argument panel has been determined by the Court, our office will notify you by mail.

Very truly yours,

CATHY A. CATTERSON
Clerk of Court

/s/ Tim Hom
Tim Hom
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOCATION OF HEARING for MARCH CALENDAR:
Date of Notice:

Richard H. Chambers
US Court of Appeals Bldg.
125 South Grand Avenue
Pasadena, CA 91105

January 26, 1998

**Monday, March 2, 1998 1:30 p.m. Courtroom 1**

| | | |
|---|---|---|
| ( )* | 97-50197 | USA v. David Melamid, etc. |
| ( )* | 97-50210 | USA v. Bassam Soueiti |
| ( )* | 97-55187 | Steve Anderson, et al. v. Anheuser-Busch Companies, Inc., et al. |
| ( ) | 96-56643 | Diane Young, et al. v. Lockheed Advanced Development Company, et al. |
| ( ) | 96-56702 | Wanda Harris, et al. v. Daryl Gates, et al. |
| ( ) | 96-56696 | Re Mark Industries, Debtor. C. Richard Moyer v. Richard A. Marshack, Trustee |

**Monday, March 2, 1998 9:00 a.m. Courtroom 3**

| | | |
|---|---|---|
| ( )* | 95-50024 | USA v. Yolanda Andrade |
| ( )* | 96-50620 | USA v. Raul Perez Gonzalez |
| ( )* | 96-56764 | Re Farideh Mehdipour, Debtor v. Marcus & Millichap |
| ( ) | 96-56701 | Re Nicholas Anthony Peters, Debtor v. Nancy Jo Rettig |
| ( ) | 96-56415 | Jack D. Riley v. Rosie B. Garcia, et al. |
| ( ) | 96-70954 | Todd Shipyards Corp., et al. v. Director, OWCP, et al. |

**Tuesday, March 3, 1998 9:00 a.m. Courtroom 1**

| | | |
|---|---|---|
| ( ) | 96-50129 | USA v. Jose De La Torre-Flores |
| ( ) | 96-50424 | USA v. Jesus Ruben Nungary |
| ( ) | 96-56587 | Litle & Company, Inc. v. Robert Mann |
| ( ) | 96-55942 | Shannon Paine v. City of Lompoc, et al. |
| ( ) | 97-71102 | Silver Sage Partners, Ltd., et al. v. USDC for the Central District of Calif.; City of Desert Hot Springs, et al., Real Parties in Interest |

**Tuesday, March 3, 1998 9:00 a.m. Courtroom 3**

| | | |
|---|---|---|
| ( ) | 96-56738 | PacOrd, Inc. v. USA, et al. |
| ( ) | 96-56787) | Re Fred Ditter, et al., Debtors v. |
| ( ) | 96-56795) | Harold Greenberg, etc., et al. |
| ( ) | 96-56675 | Coastal Abstract Service, Inc. v. First American Title Insurance Company, et al. |
| ( ) | 97-55290 | USA v. City of Torrance, et al. |

**Wednesday, March 4, 1998 9:00 a.m. Courtroom 1**

| | | |
|---|---|---|
| ( )* | 97-50299 | USA v. Tomas Soto-Tafolla |
| ( )* | 97-55140 | Georgene Koppelman v. City of LA, et al. |
| ( )* | 97-55365 | Felipe B. Cruz v. USA, et al. |
| ( ) | 96-56730 | Marianne Barklage v. City of San Bernardino, et al. |
| ( ) | 96-70932 | California Acrylic Industries Inc., etc. v. |
| ( ) | 97-70118 | National Labor Relations Board |
| ( ) | 96-70973 | Director, OWCP v. Coos Head Lumber & Plywood Co. et al. |

***MAXIMUM ARGUMENT TIME 10 MINUTES PER SIDE OTHER CASES 20 MINUTES PER SIDE PLEASE RETURN ENCLOSED ACKNOWLEDGEMENT NOTICE TO THE CLERK'S OFFICE**

**Wednesday, March 4, 1998 9:00 a.m. Courtroom 3**

| | | |
|---|---|---|
| ( )* | 97-50301 | USA V. James Randolph Davis |
| ( )* | 97-55476 | Bob Glaser v. City of San Diego, et al. |
| ( )* | 97-55511 | USA V. James Dannals |
| ( ) | 96-56778 | Mahlon Dolman v. Michael Agee, et al. |
| ( ) | 96-56810 | A.K.A. Los Angeles, Inc. v. Eddie Bauer, Inc., etc. |
| ( ) | 97-55238 | James Kodadek v. MTV Networks, Inc., et al. |

**Thursday, March 5, 1998 9:00 a.m. Courtroom 1**

| | | |
|---|---|---|
| ( )* | 96-50342 | USA v. Aurora Hilano Barrientos, etc. |
| ( )* | 97-50387 | USA v. Vernon Kembitskey |
| ( )* | 96-55025 | Trochus Ocean Products, PTE. Ltd. v. R.W. Joyce, Inc. |
| ( ) | 96-55723) | HC Dalmoreproduct v. Marc Kogan, etc., et al. |
| | **96-56827)** | |

| | | |
|---|---|---|
| ( ) | 96-55792 | Re Casa Blanca Project Lenders, LP, Debtor v. City Commerce Bank & Community Bank |
| ( ) | 97-56329 | Analog Devices, Inc. v. West Pacific Industries, et al. |

**Thursday, March 5, 1998 9:00 a.m. Courtroom 3**

| | | |
|---|---|---|
| ( )* | 96-70900 | Rodrigo Molina, et al. v. INS |
| ( )* | 96-70926 | Maria Eugenia Mendoza v. INS |
| ( )* | 97-50328 | USA v. John Doe |
| ( ) | 96-56684 | Gordon Bergelson v. Laidlaw Transit Inc. |
| ( ) | 96-56731 | Solahart Industries Pty. Ltd., etc. v. Int11 Assn. of Plumbing & Mechanical Officials, et al. |
| ( ) | 97-55010 | Adaptive Power Solutions, LLC v. Hughes Missile Systems Co., et al. |

**Friday, March 6, 1998 9:00 a..m. Courtroom 1**

| | | |
|---|---|---|
| ( )* | 96-70931 | Gonzalo Gallardo v. Director, OWCP, et al. |
| ( )* | 96-70939 | William McPherson v. Director, OWCP, et al. |
| ( ) | 96-70948 | Arnold Rosa v. Director, OWCP, et al. |

| | | |
|---|---|---|
| ( ) | 96-56808 | S. Denise Gonzalez, et al. v. MTA, etc., et al. |
| ( ) | 96-56813 | David Scott Nelson, et al. v. City of Irvine, et al. |
| ( ) | 96-56842 | Provident Life & Accident Ins. Co. v. Steven L. Cyrkin |

**Friday, March 6, 1998 9:00 a.m. Courtroom 3**

| | | |
|---|---|---|
| ( )* | 96-56760 | Re Patio Industries, et al., Debtors v. La Habra Products, Inc. |
| ( )* | 96-70946 | George Jobeh v. INS |
| ( ) | 96-70960 | Jose Bernardo Rivas v. INS |
| ( ) | 94-50535 | USA v. Michael Smushkevich |
| ( ) | 96-56850 | Rosemarie Beale v. GTE-California |
| ( ) | 97-55012 | Michael George, et al. v. City of San Diego, et al. |

***MAXIMUM ARGUMENT TIME 10 MINUTES PER SIDE**
**OTHER CASES 20 MINUTES PER SIDE**

**PLEASE RETURN ENCLOSED**
**ACKNOWLEDGEMENT NOTICE**
**TO THE CLERK'S OFFICE**

[SEAL]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| BOB GLASER,<br>Plaintiff-Appellant,<br>vs.<br>CITY OF SAN DIEGO; WJSIII INC., dba Bill Silva Presents,<br>Defendants-cross-defendants-Appellees,<br>STAFFPRO SERVICES INC.,<br>Defendant-cross-claimant-Appellee,<br>SERVICE AMERICA; ACE PARKING INC.; DOES 1 through 100, inclusive,<br>Defendant-Appellee<br>vs.<br>DOES 1 through 20, inclusive,<br>Cross-defendant-Appellee. | ) | No. 97-55476<br><br>D.C. No. CV-95-03632-MLH<br><br>(Filed February 24, 1998)<br><br>ORDER |

The court is of the unanimous opinion that the facts and legal arguments are adequately presented in the briefs and records and the decisional process would not be significantly aided by oral argument. Appellee's motion for continuance of oral argument is DENIED.

Therefore, this case is ordered submitted without oral argument on March 4, 1998, in Pasadena, California. Fed. R. App. P. 34(a); 9th Cir. R. 34-4

FOR THE COURT:
CATHY A. CATTERSON
CLERK OF THE COURT

By: /s/ Gwen Baptiste
Gwen Baptiste
Deputy Clerk

Jeffrey S. Schwartz, Esq. (SBN 128949)
**LAW OFFICE OF JEFFREY S. SCHWARTZ**
501 West Broadway, Suite 1700
San Diego, California 92101
(619) 234-5678

Attorney for Plaintiff,
**BOB GLASER**

**UNITED STATES DISTRICT COURT**

**FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| BOB GLASER,<br><br>Plaintiff,<br><br>v.<br><br>CITY OF SAN DIEGO, WJS III, INC. dba BILL SILVA PRESENTS, STAFFPRO SERVICES, INC.; SERVICE AMERICA; ACE PARKING, INC., and DOES 1 through 100, inclusive,<br><br>Defendants. | CASE NO.: 95-3632-H(BTM)<br><br>(Filed October 31, 1995)<br><br>COMPLAINT FOR INJUNCTIVE RELIEF, DECLARATORY RELIEF, DAMAGES<br><br>DEMAND FOR JURY TRIAL |

Plaintiff alleges:

## I

## JURISDICTION

1. This case is brought pursuant to 42 U.S.C. §1983 and 2000(a). Jurisdiction is based upon 28 U.S.C. §§1331 and 1343. This Court also has pendent jurisdiction over the State claims. Plaintiff's claims are authorized by 28 U.S.C. §§2201 and 2202.

## II

## VENUE

2. The claims alleged herein arose in the County of San Diego, California. Therefore, venue lies in the Southern District of California, pursuant to 28 U.S.C. §1391(b) and (c).

## III

## INTRODUCTION

3. This is a complaint for damages and declaratory and injunctive relief based upon the facts and circumstances occurring at the Elton John and Billy Joel concert at San Diego Jack Murphy Stadium on March 22, 1995. Plaintiff was one of nearly 54,000 patrons attending the sold-out concert. During the pendency of the event, men's and women's restrooms were filled beyond capacity, and women were allowed to enter the

men's restrooms despite signs and security provided both by Defendants, STAFFPRO SERVICES, INC. and CITY OF SAN DIEGO. At times the wait for women's restroom facilities was forty-five minutes. Plaintiff while his genitalia was exposed, urinating in a trough in one of the men's restrooms, was confronted by the presence of women, and in particular, on two different occasions, female patrons who pulled down their pants, and underwear, and backed up and squatted next to Plaintiff also urinating in the same trough. Plaintiff was angered, upset, embarrassed, distraught and felt violated when his privacy was invaded in such an unhealthy and unsanitary manner. Defendant, CITY OF SAN DIEGO, had been previously informed of the occurrence of this activity on their premises, however, took no steps to remedy or correct the situation. The remaining Defendants also acknowledged the prior existence of complaints of activity, however, took no measures to prevent its continued occurrence.

## IV

## PARTIES

4. Plaintiff, BOB GLASER, is and at all times hereinafter mentioned was a citizen, and taxpayer of the State of California, County of San Diego, and a paying participant at the concert.

5. Defendant, CITY OF SAN DIEGO, is and at all

times hereinafter mentioned was a charter city and a municipal corporation, a political subdivision of the State of California. Furthermore, said Defendant owns and operates the property under the auspices of the San Diego Stadium Authority Board of Governors. Furthermore, said Defendant provided San Diego police officers acting in the course and scope of their employment on the premises on the evening of March 22, 1995, for the purposes of security and law enforcement.

6. Defendant, WJS III, INC. dba BILL SILVA PRESENTS, is and was at all times hereinmentioned a corporation duly licensed to conduct business in the State of California and was the promoter of the concert event of March 22, 1995.

7. Defendant, STAFFPRO SERVICES, INC., is and was at all times hereinmentioned a corporation duly licensed under the State of California, and was hired to provide private security at San Diego Jack Murphy Stadium on the evening of March 22, 1995, including enforcement of all applicable laws.

8. Defendant, SERVICE AMERICA, INC., is and was at all times hereinmentioned a duly licensed corporation in the State of California and provided food concessions at San Diego Jack Murphy Stadium on March 22, 1995, including, but not limited to soda and beer.

9. Defendant, ACE PARKING, INC., is and was at

all times hereinafter mentioned was a corporation duly licensed to conduct business in the State of California and provided paid for parking facilities at San Diego Jack Murphy Stadium on March 22, 1995.

10. Defendants, DOES 1 through 100, are responsible in some manner for those damages alleged herein. The true names and capacities of said defendants are presently unknown to Plaintiff and he therefore, sues such Defendants by such fictitious names. Plaintiff will seek leave to amend this Complaint to add the true names and capacities of said Defendants once they have been ascertained.

V

**FACTS**

11. At all times hereinafter mentioned, each Defendant was acting in the course and scope of their employment.

12. At all times hereinafter mentioned, each Defendant was acting under color of state law.

13. On March 22, 1995, after purchasing two $50.00 tickets for himself and his wife, Plaintiff entered San Diego Jack Murphy Stadium for the purpose of attending and enjoying the Elton John and Billy Joel concert.

14. Soon after arriving, Plaintiff entered the men's restrooms at Section 13 of the San Diego Jack Murphy Stadium

and proceeded to relieve himself at the trough.

15. In the middle of his urination, at least eight women ran up to the stalls despite protestations from Plaintiff and other men in the restroom.

16. The women responded that they had to "go bad and the women's restrooms lines were too long." One woman further stated that "I can't wait." At this point, she stepped over the trough, turned backwards, pulled her pants down to her thighs, backed up to the trough and urinated.

17. At the time this was taking place, Plaintiff was standing two men down from the woman with his penis and testicles fully exposed. He turned his body away from the women as best as he was able to avoid wetting his clothes.

18. Plaintiff immediately felt angered and embarrassed, and as soon as he completed urinating left the restroom.

19. After leaving the restroom, he immediately contacted an employee of Defendant, STAFFPRO SERVICES, INC. to apprise her of the problem, however, she responded, "I am sorry, but that's not my job. I just seat people." Defendant's employee thereafter responded to Plaintiff in a condescending and placating manner.

20. Plaintiff then purchased a beer from Defendant, SERVICE AMERICA and returned to his seat, and attempted to relax and not have the recent events destroy his evening.

21. Immediately prior to the commencement of the concert, Plaintiff returned to the men's restroom at Section 13 to relieve himself. At that time, he saw approximately 20 to 30 women in lines in front of the stalls.

22. Without relieving himself, he left the restroom and returned to Defendant, STAFFPRO SERVICES, INC.'s employee, informing her of the situation and how it had not changed. Defendant, STAFFPRO SERVICES, INC.'s employee replied, "There is really nothing I can do. This happens at every concert. I haven't seen an officer yet, but I will tell them when I do."

23. Plaintiff then located another employee of Defendant, STAFFPRO SERVICES, INC. to apprise her of the situation, however, she responded "What am I supposed to do? I can't get them out. You need to find an officer."

24. Plaintiff still needing to relieve himself proceeded to the men's restroom at Section 9 and the men's restroom Section 17, however, the same situation was present at each of these locations.

25. So that Plaintiff's health would not be further sacrificed or jeopardized, he entered the restroom at Section 17 where dozens of women were lined up in the men's stalls and relieved himself in a corner of the trough trying to block their vision while his penis remained exposed.

26. During the time Plaintiff was urinating, he heard

laughter from the women and comments as follows: "It sure smells in here." "No wonder they don't have any lines. Look at the way they just go against the wall." "I have never been in a men's room before." "Everybody does it at these big concerts. It's ok, just stick together." "I feel pretty silly in here."

27. After relieving himself, Plaintiff complained to employees of Defendant, STAFFPRO SERVICES, INC., however, his breath was wasted since no action was taken.

28. Prior to returning to his seat, Plaintiff made another purchase from Defendant, SERVICE AMERICA, INC., and proceeded to watch the concert.

29. Prior to the intermission, Plaintiff returned to the restroom in Section 13 to relieve himself. He noticed two San Diego Police Department officers and inquired whether they had cleared the men's restroom of women.

30. The officers acknowledged stating "Yes Sir ... it's safe to go in" and left. When Plaintiff requested that they stand guard of the restroom, they responded that it was not their job and they were "to keep circulating." The officer then continued "frankly they need more women's restrooms."

31. Plaintiff thereafter entered the restroom and stood at the trough. While he was urinating, obviously with this penis still exposed, a large group of women came rushing in giggling and stating "I thought those cops would never leave."

32. While Plaintiff and other men yelled at the women to leave, most of them remained, and ignored the pleas of the men.

33. Plaintiff was clearly embarrassed, humiliated, angry, saddened, upset, and disgusted. He was frustrated that his privacy was invaded and that he was unable to perform a necessary bodily function required to maintain his health, and forced to do so in an unwelcome public atmosphere with members of the opposite sex.

34. During Plaintiff's fourth trip to the men's restroom, he was initially successful in convincing two employees from Defendant, STAFFPRO SERVICES, INC. to escort women out of the restroom, however, when he again approached the urinal and exposed his penis, waiting to urinate, more women came running into the restroom, ignoring the protestations of Plaintiff and other men, stating "We have to go bad, just get over it." At this time, one woman was directly next to Plaintiff while he was urinating, pulled her pants down, backed up to the trough, and urinated while being cheered on by the other women, cheering "go girl."

35. Plaintiff's anger, frustration, humiliation, disgust, and frustration was so overwhelming that he was not able to enjoy the rest of the concert.

36. On one other occasion during the concert, Plaintiff again needed to return to the men's restroom to avoid

the inevitable reality of urinating in his pants. Despite the presence of women, Plaintiff was aware that his protestations had and would fall on deaf ears, went to the corner of trough, attempted to block himself as best as he could and urinated.

37. At the conclusion of the concert, Plaintiff relieved himself one last time at the Stadium, however, this time solely in the presence of men, yet the topic of conversation in the restroom was the presence of women throughout the entire concert.

38. The topic of conversation regarding women in the restroom at the concert continued while exiting the Stadium, and into the following morning over the San Diego airwaves, and throughout the community at large.

39. On March 28, 1995, Plaintiff filed a claim against the CITY OF SAN DIEGO for their failure to provide adequate facilities to allow patrons of the Stadium to urinate in a protected environment with others of their same sex. Additionally, Plaintiff alleged that San Diego City police officers failed to enforce San Diego Municipal Court §59.0103(f) which states:

> No person of either sex shall enter the clearly marked and designated restroom facilities of the opposite sex at San Diego Jack Murphy Stadium.

40. San Diego Jack Murphy Stadium is a place of public accommodation as defined in 42 U.S.C. §2000(a)(b); its operations affect commerce as defined in 42 U.S.C. §2000(a)(c); in that it customarily presents performances that are in commerce, including the Elton John and Billy Joel concert; and the performance involved a state action under color of law as defined in 42 U.S.C. §2000(a) (d), in that the Stadium is owned, operated and regulated by the CITY OF SAN DIEGO.

41. Defendant, CITY OF SAN DIEGO, has scheduled and allowed other events at San Diego Jack Murphy Stadium prior to March 22, 1995, where they have been made aware of the dangerous condition previously stated, including The Eagles and Rolling Stones concerts.

42. In allowing almost 54,000 people, including a high percentage of female patrons to again be placed in a confined area with inadequate facilities, the Defendants created a danger with reckless and callous disregard for the patrons, acting with deliberate indifference. Furthermore, the patrons at San Diego Jack Murphy Stadium were required to pay for their confinement through admission costs, parking fees and inflated refreshments costs.

43. San Diego Municipal Court §22.0207 requires permits be issued for special events which set forth the

"number and location of

> portable sanitation facilities, where appropriate, and other equipment or services necessary to conduct the event with due regard for participants and public health and safety."

The statute continues setting forth standards, including the provision for

> "safety, health or sanitation equipment, services or facilities reasonably necessary to ensure that the event would be conducted with due regard for safety."

Additionally, the standard would not be met when

> "the event creates the eminent possibility of violent or disorderly conduct likely to endanger public safety or to result in significant property damage."

44. By allowing the individuals of both sexes to publicly expose their genitalia together in a confined area, in an environment where alcohol is served, and a party atmosphere and live music is presented, clearly "creates the eminent possibility of violent disorderly conduct, likely to endanger public safety." "And does not provide

> "safety, health or sanitation equipment, services or facilities reasonably believed necessary to ensure that the event would be conducted with due regards for safety."

45. As early as January of 1986, the Stadium Board of Governors was concerned about security at the Stadium, including the use of "questionable security companies."

46. Soon thereafter, the San Diego Stadium Authority unanimously approved an ordinance which was eventually adopted by Defendant, CITY OF SAN DIEGO, setting forth "enforcement tools" which require sufficient personnel at each Stadium events, based on the estimated crowd size and type of event which would be set forth as "the rules of the road" for the stadium. (San Diego Municipal Code Section 59.0103).

47. Following a concert in June of 1994, by The Eagles, Defendant, CITY OF SAN DIEGO, through their Stadium Authority, was once again reminded of the problem set forth earlier with regards to inadequate restroom facilities, and

acknowledged no further concerts would be presented until the problem was corrected.

48. Furthermore, following the June 1994 Eagles' concert, the CITY OF SAN DIEGO, acknowledged that this was the largest gross sale concert in Stadium history, grossing $2.5 million in tickets and future events of that caliber should be scheduled.

49. In March of 1995, San Diego Jack Murphy Stadium, was equipped with 38 women's restrooms with sufficient space for 9 women at a time to use the facility. Thus, at any one time 342 women were able to perform a necessary bodily function in a closed door stall in a sanitary manner.

50. In February of 1995, at the Jack Murphy Stadium had 36 men's restrooms allowing 5 men to perform a necessary bodily function in a stall with a closed door and approximately 10 men to perform a necessary bodily function while standing in a row, penises exposed without any barriers. Thus, at any one time 540 men performed a necessary bodily function at the San Diego Jack Murphy Stadium.

51. Not included in these calculations were the 79 private sky boxes, including "The City Box" used by Defendant, CITY OF SAN DIEGO officials, each with their own personal restroom. Therefore, exclusive of the private sky boxes, the ratio of men's facilities to women's facilities at San Diego Jack Murphy Stadium on March 22, 1995, was nearly

two men's facilities to every one woman's facility.

52. The first clause of the mission statement for San Diego Jack Murphy Stadium is "To provide a first class facility that is safe."

53. San Diego Jack Murphy Stadium has previously instituted policies released to the general public which they acknowledged are unenforceable in an attempt to mislead the public.

54. San Diego Jack Murphy Stadium Authority has also acknowledged that "the adequacy of women's facilities is a problem at all major events," however, they have not remedied the problem by installing new facilities or otherwise change the ratio at the Stadium. Furthermore, "sell out" events with over 54,000 people continue to be scheduled.

55. While the Equitable Restroom Act requiring 3.5 women's facilities to one men's facility has been adopted in other states of the Union, neither California nor the CITY OF SAN DIEGO, as a charter city has adopted such a standard.

56. As a direct and proximate result of Defendants' conduct, MR. GLASER has suffered anger, humiliation, frustration, embarrassment, loss of earnings and loss of enjoyment of the concert, all in an amount according to proof at the time of trial.

57. The actions of defendants in allowing an unsafe, unsanitary condition to exist, in a confined area which they

charged for, amounts to actions taken with deliberate indifference and a reckless and callous disregard for the rights of Plaintiff, thus justifying an award of punitive and exemplary damages.

58. On May 11th, 1995 the CITY OF SAN DIEGO, formally denied the claim of MR. GLASER and provided him a right to sue letter. This action is therefore timely pursuant to California Government Code §945.6.

## VI

## CLAIMS

### FIRST CAUSE OF ACTION

**(Request for Declaratory and Injunctive Relief)**

59. Plaintiff hereby incorporates paragraphs 1 through 57 of this Complaint as if set forth fully herein.

60. Despite many circumstances of prior knowledge, and including this claim, Defendant, CITY OF SAN DIEGO, was and is aware of the dangerous condition creating a health and safety hazard on the premises of San Diego Jack Murphy Stadium any time a major event is scheduled.

61. Despite this knowledge and actual acknowledgement of this problem, by the Stadium manager, and acknowledgement by the Stadium manager that it would be corrected prior to subsequent events, Defendant, CITY OF SAN DIEGO, has continued to allow the situation to exist.

62. Plaintiff has attempted to resolve this issue short of litigation at the request of Defendant, CITY OF SAN DIEGO, by the following acts: meeting with the City manager, meeting with the Stadium Authority, meeting with the facilities subcommittee of the Stadium Authority, addressing the City Council, preparing and proposing legislation to the City council, filing a letter of opposition to Certification of a Mitigated Negative Declaration.

63. All attempts at resolution have failed, and Defendant, CITY OF SAN DIEGO, has made their position abundantly clear that they will continue to engage in such hazardous, unsanitary and unsafe actions until enjoined and restrained by this Court. Furthermore, the City Manager has stated "tell Bob to go ahead and sue."

64. Without judicial intervention, Defendants' reckless and callous acts will continue to cause great irreparable injury not only to Plaintiff, but all future patrons of San Diego Jack Murphy Stadium, particularly women. Plaintiff has no clear, adequate or complete remedy at law, and this suit for injunction is the only means to secure relief.

**SECOND CAUSE OF ACTION**

**(Deprivation of Civil Rights)**

65. Plaintiff hereby incorporates paragraphs 1 through 57 of this Complaint as if set forth fully herein.

66. By depriving Plaintiff of his constitutionally

protected civil rights including but not limited to privacy and equal protection, Defendants, and each of them, are in violation of 42 U.S.C. §1983.

67. By engaging in acts of discrimination at a place of public accommodation, Defendants, and each of them, are in violation of 42 U.S.C. §2000(a).

**THIRD CAUSE OF ACTION**

**(Violation of Personal Security Interest)**

68. Plaintiff hereby incorporates paragraphs 1 through 57 of this Complaint as if set forth fully herein.

69. By allowing Plaintiff to be confronted with members of the opposite sex who were blatantly in violation of local law, who taunted him and caused great difficulty in performing a necessary bodily function, Defendants were deliberately indifferent to Plaintiff's right to personal security in violation of the Fourteenth Amendment of the United States Constitution.

**FOURTH CAUSE OF ACTION**

**(Invasion of Privacy)**

70. Plaintiff hereby incorporates paragraphs 1 through 57 of this Complaint as if set forth fully herein.

71. Plaintiff had an expectation of privacy upon entering a designated single sex bathroom facility that once his penis was exposed during the urination process, no individuals of the opposite sex would be present to observe and taunt him.

72. By allowing such activity, Defendants, and each of them, deprived Plaintiff of his constitutionally guaranteed right to privacy of the Fourteenth Amendment.

**FIFTH CAUSE OF ACTION**

**(Nuisance)**

73. Plaintiff hereby incorporates paragraphs 1 through 57 of this Complaint as if set forth fully herein.

74. By creating an environment in which laws were not properly enforced, and facilities were not adequately provided and supervised, and in which the consumption of alcohol was available and encouraged, with full knowledge that the effects of alcohol required the frequent excretion of bodily fluids; and by placing Plaintiff in a confined space with inadequate facilities to relieve himself, due to the overflow of women during his urination, due to the inadequate men/women facilities ratio. Defendants, and each of them, created a nuisance on public property.

75. As a direct and proximate result of Defendants' conduct, Plaintiff sustained damages as alleged herein.

**SIXTH CAUSE OF ACTION**

**(Premises Liability)**

76. Plaintiff hereby incorporates paragraphs 1 through 57 of this Complaint as if set forth fully herein.

77. Defendant, CITY OF SAN DIEGO, negligently owned, maintained, managed and operated SAN DIEGO JACK

MURPHY STADIUM on March 22, 1995.

78. Furthermore, Defendant, CITY OF SAN DIEGO, willfully and maliciously failed to guard and warn against a dangerous condition being the inadequate ratio of men and women's restroom facilities.

79. Plaintiff, BOB GLASER, was a paying guest at San Diego Jack Murphy Stadium.

80. Defendant, CITY OF SAN DIEGO, who owned the public property, had actual notice of existence of the dangerous condition and sufficient time to correct it, however failed to do so.

81. As a direct and proximate result, Plaintiff sustained those damages alleged herein.

**SEVENTH CAUSE OF ACTION**

**(Negligence Per Se)**

82. Plaintiff hereby incorporates paragraphs 1 through 57 of this Complaint as if set forth fully herein.

83. Defendants, CITY OF SAN DIEGO, WJS III, INC., dba BILL SILVA PRESENTS, and STAFFPRO SERVICES, INC., had a duty to enforce San Diego Municipal Code §59.0103(f).

84. By failing to enforce said code section, said Defendants breached their duty.

85. As a direct and proximate cause of Defendants' negligence, Plaintiff has been damaged as alleged herein.

## EIGHTH CAUSE OF ACTION

### (Negligence)

86. Plaintiff hereby incorporates paragraphs 1 through 57 of this Complaint as if set forth fully herein.

87. Defendants had a duty to provide a safe and sanitary environment for the patrons of the concert of March 22, 1995.

88. Said Defendants knew that nearly 54,000 patrons would be confined in an area with inadequate health facilities.

89. Defendant, SERVICE AMERICA INC., given their exclusive contract with Defendant, CITY OF SAN DIEGO, and the prior events at this venue, knew that the alcohol and other beverages they held out for sale to the patrons of San Diego Jack Murphy Stadium would necessitate patrons to use restroom facilities during the three-to-five-hour time frame that they were in the confined facility.

90. By not providing adequate ratio of facilities, Defendants, and each of them, breached their duty.

91. As a direct and proximate cause of Defendants' negligence, Plaintiff sustained damages as alleged herein.

## NINTH CAUSE OF ACTION

### (Breach of Contract)

92. Plaintiff hereby incorporates paragraphs 1 through 57 of this Complaint as if set forth fully herein.

93. The purchase of an admission ticket to the San

Diego Jack Murphy Stadium for the purpose of attending the event on March 22, 1995, created a contract between Defendants and Plaintiff.

94. The terms of the contract were that for the consideration paid, specifically $50.00 per ticket, Defendants would provide an adequate, safe and secure facility to witness and enjoy an entertainment event.

95. Plaintiff has fully performed all obligations required from him under the contract, specifically the purchase of the admission ticket, and even notifying those agents charged with enforcement of the laws of the ongoing violations.

96. Defendants have failed to perform their conditions, and covenants in that the facility in which Plaintiff was confined, was neither safe nor secure in that he was unable to 1) enjoy the concert, and 2) perform his necessary bodily functions without unnecessary difficulty.

97. As a direct and proximate cause of Defendant's breach of contract, Plaintiff has sustained damages as alleged herein.

## VII
## PRAYER

WHEREFORE, Plaintiff prays for the following relief against Defendants, and each of them:

1) For an injunction prohibiting Defendants from

engaging in such violations in the future;

2) For a declaration requiring Defendant CITY OF SAN DIEGO to change the facilities at San Diego Jack Murphy Stadium so as to provide for safe and sanitary conditions, including an equitable restroom ratio;

3) For the Court's retention of jurisdiction until such measures have been implemented to secure safe and sanitary conditions at San Diego Jack Murphy Stadium without any violation of local, state or federal laws;

4) For costs and reasonable attorney's fees pursuant to 42 U.S.C. §1988 and §2000a-3;

5) For punitive damages against Defendants in an amount according to proof;

6) For compensatory damages in an amount according to proof;

7) For such other just and equitable relief as this Court deems proper.

## VIII

## JURY DEMAND

Plaintiff hereby demands trial by jury.

Respectively submitted,

DATED: October 27, 1995

LAW OFFICE OF JEFFREY S. SCHWARTZ

/s/ Jeffrey S. Schwartz

JEFFREY S. SCHWARTZ

Attorney for Plaintiff

**BOB GLASER**

## VERIFICATION

I, **BOB GLASER,** am the Plaintiff in this action. I have read the attached **COMPLAINT FOR INJUNCTIVE RELIEF, DECLARATORY RELIEF, DAMAGES; DEMAND FOR JURY TRIAL,** and know the contents thereof. The same is true of my own personal knowledge, except the matters that are stated on my information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on October 27, 1995,1995, at San Diego, California.

/s/ Bobby G. Glaser
BOB GLASER

Jeffrey S. Schwartz, Esq. (SBN 128949)
**LAW OFFICE OF JEFFREY S. SCHWARTZ**
501 West Broadway, Suite 1700
San Diego, California 92101
(619) 234-5678

Attorney for Plaintiff,
**BOB GLASER**

**UNITED STATES DISTRICT COURT**

**FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

| | |
|---|---|
| BOB GLASER,<br><br>Plaintiff,<br><br>v.<br><br>CITY OF SAN DIEGO, WJS III, INC. dba BILL SILVA PRESENTS, STAFFPRO SERVICES, INC.;SERVICE AMERICA; ACE PARKING, INC., and DOES 1 through 100, inclusive,<br>Defendants | ) CASE NO.: 95-3632H (AJB)<br>)<br>) (Filed February 6, 1996)<br>)<br>) FIRST AMENDED COMPLAINT FOR INJUNCTIVE RELIEF, DECLARATORY RELIEF, DAMAGES<br>)<br>) DEMAND FOR JURY TRIAL |

Plaintiff alleges:

## I
## JURISDICTION

1. This case is brought pursuant to 42 U.S.C. §1983. Jurisdiction is based upon 28 U.S.C. §§1331 and 1343. This Court also has pendent jurisdiction over the State claims. Plaintiff's claims are authorized by 28 U.S.C. §§2201 and 2202.

## II
## VENUE

2. The claims alleged herein arose in the County of San Diego, California. Therefore, venue lies in the Southern District of California, pursuant to 28 U.S.C. §1391(b) and (c).

## III
## INTRODUCTION

3. This is a complaint for declaratory and injunctive relief and for damages based upon the facts and circumstances occurring at the Elton John and Billy Joel concert at San Diego Jack Murphy Stadium on March 22, 1995. Plaintiff was one of nearly 54,000 patrons attending the sold-out concert. During the pendency of the event, both men's and women's restrooms were **filled beyond capacity**, and women were allowed to enter the men's restrooms as they had for numerous prior events, despite signs, statutory mandates, and security provided both by Defendants, STAFFPRO

SERVICES, INC. and CITY OF SAN DIEGO. At times the wait for women's restroom facilities was forty-five minutes.

4. Plaintiff while his genitalia was exposed, urinating in a trough, not a urinal as none were provided, and all stalls were occupied, in one of the men's restrooms, was confronted by the presence of women, who were allowed to freely enter. The female patrons pulled down their pants, and underwear, exposing their genitalia, and backed up and squatted next to Plaintiff and urinated in the same trough. Plaintiff, and other men protested to the women, and attempted to shield his genitalia but his attempts were not successful. Plaintiff was angered, upset, embarrassed, distraught and felt violated when his expectation of single sex privacy was invaded, and destroyed, and an unhealthy and unsanitary environment was thereafter created. Defendant, CITY OF SAN DIEGO, for years before had been previously informed of the occurrence of this activity on their premises, acknowledged the problem, and stated they would refrain from future events prior to it being corrected, however, took no steps to remedy or correct the situation, prior to Plaintiff's filing his government claim in March 28, 1995. The remaining Defendants also acknowledged the prior existence of complaints of activity, however, took no measures to prevent its continued occurrence.

## IV

## PARTIES

5. Plaintiff, BOB GLASER, is and at all times

hereinafter mentioned was a citizen, and taxpayer of the State of California, County of San Diego, and a paying participant at the concert.

6. Defendant, CITY OF SAN DIEGO, is and at all times hereinafter mentioned was a charter city and a municipal corporation, a political subdivision of the State of California. Furthermore, said Defendant owns and operates San Diego Jack Murphy Stadium under the auspices of the San Diego Stadium Authority Board of Governors. Furthermore, said Defendant provided San Diego police officers acting in the course and scope of their employment on the premises on the evening of March 22, 1995, for the purposes of security and law enforcement.

7. Defendant, WJS III, INC. dba BILL SILVA PRESENTS, is and was at all times hereinmentioned a corporation duly licensed to conduct business in the State of California and was the promoter of the concert event of March 22, 1995 under a permit with Defendant, CITY OF SAN DIEGO.

8. Defendant, STAFFPRO SERVICES, INC., is and was at all times hereinmentioned a corporation duly licensed under the State of California, and was hired to provide private security at San Diego Jack Murphy Stadium on the evening of March 22, 1995, including enforcement of all applicable laws.

9. Defendant, SERVICE AMERICA, INC., is and

was at all times hereinmentioned a duly licensed corporation in the State of California, had a contract with Defendant, CITY OF SAN DIEGO, for concessions, and provided food concessions at San Diego Jack Murphy Stadium on March 22, 1995, including, but not limited to soda and beer.

10. Defendants, DOES 1 through 100, are responsible in some manner for those damages alleged herein. The true names and capacities of said defendants are presently unknown to Plaintiff and he therefore, sues such Defendants by such fictitious names. Plaintiff will seek leave to amend this Complaint to add the true names and capacities of said Defendants once they have been ascertained.

V

**FACTS**

11. At all times hereinafter mentioned, each Defendant was acting in the course and scope of their employment.

12. At all times hereinafter mentioned, each Defendant was acting under color of state law as the event was held at a facility owned and operated by Defendant, CITY OF SAN DIEGO. All Co-Defendants had contracts with Defendant, CITY OF SAN DIEGO, and Defendant, WJS III, INC., even needed to complete a permitting process prior to the promotion of the event which was established and mandated Defendant, CITY OF SAN DIEGO.

13. On March 22, 1995, after purchasing two $50.00

tickets for himself and his wife, Plaintiff entered San Diego Jack Murphy Stadium for the purpose of attending and enjoying the Elton John and Billy Joel concert.

14. Soon after arriving, and locating his seat assignment, Plaintiff entered the men's restroom at Section 13 of the San Diego Jack Murphy Stadium and as soon as he was able, he proceeded to relieve himself, addressing a necessary bodily function and medical necessity at the trough, as this was the first and only available location for him to do so, as all stalls were occupied, no urinals existed, and other men were standing at all other locations at the trough.

15. Plaintiff relied on the designation of "men's" restroom, that its occupancy would only be men. Plaintiff has used men's restrooms previously and has accepted that other men may be present. Plaintiff therefore accepted that his genitalia may be exposed to other men, but Plaintiff did not expect or accept that his genitalia would be exposed to women.

16. Plaintiff, for reasons of security, modesty, and fundamental bodily privacy did not desire, or expect, or acquiesce to having his genitalia exposed to members of the opposite sex who are strangers to him in an environment which was neither consensual or medical. For this reason, Plaintiff covered his genitalia prior to entering the men's restroom and covered his genitalia after exiting the men's restroom.

17. In the middle of his urination, at least eight women freely and without prohibition ran into the restroom,

despite the posted "mens" sign, despite the presence of San Diego police officers patrolling, and despite the presence of private security contracted pursuant to permitting requirements.

18. The women ran up to the closed and occupied stalls despite loud protestations from Plaintiff and other men in the restroom.

19. The women responded that they had to "go bad and the women's restrooms lines were too long." One woman further stated that "I can't wait." At this point, she stepped over the trough; turned backwards, pulled her pants down to her thighs, exposing her genitalia, backed up to the trough, pushed her way between the men, and urinated.

20. At the time this was taking place, Plaintiff was standing two men down from the woman with his penis and testicles fully exposed, still engaging in his need to relieve himself. He turned his body away from the women as best as he was able in order to protect whatever modicum of privacy he had left, and to avoid wetting his clothes.

21. Plaintiff immediately felt violated, angered, ashamed and embarrassed. As soon as he completed urinating and returned his genitalia to a private, protected, and safe location, he left the restroom.

22. Upon leaving the restroom, he immediately contacted an employee of Defendant, STAFFPRO SERVICES, INC. to apprise **her** of the problem, however, she responded, "I am sorry, but that's not my job. I just seat people." Defendant's

employee thereafter acknowledged the problem, acknowledged the prior existence of the problem but responded to Plaintiff in a condescending and placating manner.

23. Plaintiff then purchased a beer from Defendant, SERVICE AMERICA who had been selling beer since the Stadium opened that evening, had their concession stand located between the men's restroom and women's restroom, where the lines from the restroom extended to the sales area, and where it was visible that women were entering the men's restrooms. Furthermore, Defendant, SERVICE AMERICA, had been selling beer at the same locations at all prior events at San Diego Jack Murphy Stadium, where the same situation has previously occurred, specifically women entering the men's restrooms.

24. Plaintiff returned to his seat, and attempted to relax and not have the recent events destroy his evening.

25. Immediately prior to the commencement of the concert, Plaintiff returned to the men's restroom at Section 13 to again perform a medically necessary function as his bladder was full. At that time, he saw approximately 20 to 30 women in lines in front of the stalls.

26. Without relieving himself, he left the restroom and returned to Defendant, STAFFPRO SERVICES, INC.'s employee, informing **her** of the situation and how it had not changed. Defendant, STAFFPRO SERVICES, INC.'s employee replied, "There is really nothing I can do. **This**

**happens at every concert.** I haven't seen an officer yet, but I will tell them when I do."

27. Plaintiff then located another employee of Defendant, STAFFPRO SERVICES, INC. to apprise **her** of the situation, however, she responded "What am I supposed to do? I can't get them out. You need to find an officer."

28. Plaintiff still needing to relieve himself, and being unable to do so in at least single sex privacy, worsening his medical health and condition, proceeded to the men's restroom at Section 9 and the men's restroom at Section 17, however, the same situation was present at each of these locations, specifically long lines, women in the lines, no urinals, and only four stalls placed in the restroom which were occupied.

29. So that Plaintiff's health and medical needs would not be further sacrificed or jeopardized, he entered the restroom at Section 17 where dozens of women were lined up in the men's stalls and relieved himself in a corner of the trough trying to block their vision while his penis remained exposed.

30. It was more difficult for Plaintiff to relieve himself with the knowledge that women were around him able to view the most private part of his anatomy thus complicating the urination process.

31. During the time Plaintiff was urinating, he heard laughter from the women and comments as follows: "It sure smells in here." "No wonder they don't have any lines. Look

at the way they just go against the wall." "I have never been in a men's room before." **"Everybody does it at these big concerts.** It's ok, just stick together." "I feel pretty silly in here."

32. After relieving himself, Plaintiff continued to complain to employees of Defendant, STAFFPRO SERVICES, INC., however, his breath was wasted since no action was taken.

33. Prior to returning to his seat, Plaintiff made another purchase from Defendant, SERVICE AMERICA, INC., and proceeded to watch the concert. He had hoped that all his notifications and protestations would have served to remedy the situation and that during any future trips to the restroom, he would not have to encounter the same problem.

34. Prior to the intermission, Plaintiff returned to the restroom in Section 13 to relieve himself as his then present condition created a medical need to do so. He noticed two San Diego Police Department officers and inquired whether they had cleared the men's restroom of women.

35. The officers acknowledged stating "Yes Sir ... it's safe to go in" and left. When Plaintiff requested that they stand guard of the restroom, to protect his rights, and allow him to perform the medically necessary function, they responded that **it was <u>not</u> their job** and they were "to keep circulating." The officer then continued **"frankly they need more women's restrooms."**

36. Plaintiff thereafter entered the restroom and stood at the trough as again this was the only available place for him. While he was urinating, obviously with his penis still exposed, a large group of women came rushing in giggling and stating "I thought those cops would never leave." These women were obviously aware that there was inadequate security, inadequate enforcement and inadequate restroom facilities provided at the city owned stadium since they had the availability, opportunity, and knowledge that they could enter the men's restroom while men were performing the same medically necessary function that they were required to perform.

37. While Plaintiff and other men, other men who were experiencing the same complaints and symptoms as Plaintiff, i.e., having difficulty performing a medically necessary function, yelled at the women to leave, most of them remained, and ignored the pleas of the men.

38. Plaintiff was clearly violated, embarrassed, humiliated, angry, saddened, upset, and disgusted. He was frustrated that his fundamental bodily privacy was invaded, and that he was unable to perform a medically necessary bodily function required to maintain his health, unless it was in an unwelcome public atmosphere with members of the opposite sex, creating an unsafe and unsanitary environment.

39. The actions of Defendant, CITY OF SAN DIEGO, by not having their assigned agents, the police officers

on duty, adequately protect Plaintiff despite their affirmative attempts to do so amounted to deliberate indifference of his medical needs.

40. At the moment that Defendant, CITY OF SAN DIEGO's agents began protecting Plaintiff by taking the affirmative actions of clearing the restroom, they created a special relationship with Plaintiff. Since Defendant's agents were at all times aware of the problem, by prior notice, by special instructions the night of the event, and actually by Plaintiff's complaints to them and to others, including Defendant, STAFFPRO SERVICES, INC., they had the continued duty to "serve and protect." Defendant's failure to act once they began to act, at least as to his Plaintiff, increased his risk of harm, especially since women rushed to the men's restroom.

41. By the comments of the women who rushed to the men's restroom, Defendant's presence did serve as a deterrent. Since the physical act of performing the medically necessary function of urination is one minute or less, the burden of the officers to remain in that location for five minutes or less substantially is not that great when given the benefit to Plaintiff and his avoidance of harm.

42. During Plaintiff's fourth trip to the men's restroom, he was initially successful in convincing two employees from Defendant, STAFFPRO SERVICES, INC. to take affirmative action in escorting women out of the restroom,

however, when he again approached the urinal and exposed his penis, waiting to urinate, more women came running into the restroom, ignoring the protestations of Plaintiff and other men, stating "We have to go bad, just get over it."

43. At this time, one woman was directly next to Plaintiff while he was urinating, pulled her pants down, backed up to the trough, and urinated while being cheered on by the other women, cheering "go girl."

44. It was apparent to Plaintiff at this time that defendant, STAFFPRO SERVICES, INC., had not adequately acted to protect
Plaintiff, and clearly demonstrated deliberate indifference to his medical needs.

45. The actions of Defendant, CITY OF SAN DIEGO, by allowing the condition of inadequate restroom facilities, and the invasion of men's restrooms by women to exist at the Stadium for an extended period despite their prior notice of this condition, amounted to deliberate indifference for Plaintiff's medical needs.

46. Plaintiff's anger, frustration, humiliation, disgust, and frustration was so overwhelming that he was not able to enjoy the rest of the concert.

47. On one other occasion during the concert, Plaintiff again needed to return to the men's restroom to avoid the inevitable reality of causing himself great bodily harm or urinating in his pants. Despite the presence of women, Plaintiff

was aware that his protestations had, and would continue to fall on deaf ears.

48. He was already violated, had been stripped of his dignity, went to the corner of trough, again the only available location, attempted to block himself as best as he could and urinated.

49. At the conclusion of the concert, Plaintiff relieved himself one last time at the Stadium, however, this time solely in the presence of men. The topic of conversation in the restroom, however, was the continued presence of women throughout the entire concert.

50. The topic of conversation regarding women in the restrooms at the concert continued while exiting the Stadium, and into the following morning over the San Diego airwaves, and throughout the community at large. This discussion acknowledged the prior existence of the problem and the continued avoidance of the same.

51. On March 28, 1995, Plaintiff filed a claim against the CITY OF SAN DIEGO for their failure to provide adequate facilities to allow patrons of the Stadium to urinate in a protected environment with others of their same sex. Additionally, Plaintiff alleged that San Diego City police officers failed to enforce San Diego Municipal Court §59.0103(f) which states:

> No person of either sex shall enter the clearly marked and

designated restroom facilities of the opposite sex at San Diego Jack Murphy Stadium.

52. Defendant, CITY OF SAN DIEGO, has scheduled and allowed other events at San Diego Jack Murphy Stadium prior to March 22, 1995, where they have been made aware of the dangerous condition previously stated, including The Eagles and Rolling Stones concerts.

53. In allowing almost 54,000 people, including a high percentage of female patrons to again be placed in a confined area with inadequate restroom facilities, the Defendants created a danger with reckless and callous disregard for the patrons, acting with deliberate indifference for the medical needs of the patrons. Furthermore, the patrons at San Diego Jack Murphy Stadium were required to pay for their confinement through admission costs, parking fees and inflated refreshments costs.

54. The Stadium Authority Board of Governors performs vital government functions for Defendant, CITY OF SAN DIEGO, in that tit determines among other things how revenue is to be raised, and how funds are to be spent, what policies should be established and followed.

55. The policy for permitting adopted by Defendant, CITY OF SAN DIEGO, is set forth at San Diego Municipal Court §22.0207 which requires permits be issued for special events which set forth the

> "number and location of portable sanitation facilities, where appropriate, and other equipment or services necessary to conduct the event with due **regard for participants and public health and safety**."

The statute continues setting forth standards, including the provision for

> "safety, health or sanitation equipment, services or facilities reasonably necessary to ensure that the event would be conducted **with due regard for safety**."

Additionally, the standard would not be met when

> "the event creates the eminent possibility of violent or disorderly conduct **likely to endanger public safety** or to result in significant property damage."

56. By continuously allowing the individuals of both sexes to publicly expose their genitalia together in a confined area, in an environment where alcohol is served, and in a party atmosphere and where live music is presented, clearly "creates

the eminent possibility of violent disorderly conduct, likely to endanger public safety." "And does not provide "safety, health or sanitation equipment, services or facilities reasonably believed necessary to ensure that the event would be conducted with due regards for safety."

57. Defendants, CITY OF SAN DIEGO, SERVICE AMERICA, WJS III, and STAFFPRO SERVICES, INC., have been aware of the ongoing problem at San Diego Jack Murphy Stadium, not only because of prior events such as concerts and sold-out sporting evens, but by actual prior notice by a complaint of another patron following the Eagles concert in June of 1994, when a letter was written to Stadium Manager, Bill Wilson.

58. The content of this letter was an explanation of the same concern and problem that Plaintiff asserted, specifically the inability to perform a medically necessary bodily function in a safe and secure private, same sex environment. The male concert patron complained about women entering the men's restroom, and the Stadium Manager sent a reply letter to the patron stating the problem would be remedied before any future similar events were scheduled.

59. Defendant, CITY OF SAN DIEGO, by their acts of omission and inaction in not addressing and correcting the known problem, and then by continuing to allow the condition to continue, to the detriment of Plaintiff and countless other patrons, clearly demonstrated deliberate indifference to

Plaintiff's medical needs.

60. As early as January of 1986, as evidenced by their official minutes, the Stadium Board of Governors was concerned about security at the Stadium, especially for special events, including the use of "questionable security companies."

61. Soon thereafter, on February 13, 1986, the San Diego Stadium Authority unanimously approved an ordinance which was eventually adopted by Defendant, CITY OF SAN DIEGO, setting forth "enforcement tools" which require sufficient personnel at each Stadium events, based on the estimated crowd size and type of event which would be set forth as "the rules of the road" for the stadium. (San Diego Municipal Code Section 59.0103).

62. Furthermore, following the June 1994 Eagles' concert, the CITY OF SAN DIEGO, acknowledged that this was the largest gross sale concert in Stadium history, grossing $2.5 million in tickets and future events of that caliber should be scheduled. In the official minutes of the Stadium Board, however, there was no mention of the formal letter complaint sent by a patron of the concert even though a specific portion of meetings and the minutes are reserved for "communications."

63. In March of 1995, San Diego Jack Murphy Stadium, was equipped with 38 women's restrooms with sufficient space for up to 9 women at a time to use the facility. At any one time 303 women were able to perform a medically necessary bodily function in a same sex closed door stall in a

sanitary manner.

64. In March of 1995, San Diego Jack Murphy Stadium had 36 men's restrooms allowing up to 5 men to perform a medically necessary bodily function in a stall with a closed door, and up to 18 feet of trough in each restroom for men to perform a medically necessary bodily function while standing in a row, penises exposed without any barriers. Thus, at any one time 738 men performed a medically necessary bodily function at the San Diego Jack Murphy Stadium.

65. Not included in these calculations were the 79 private sky boxes, including "The City Box" used by Defendant, CITY OF SAN DIEGO officials, each with their own personal restroom. Therefore, exclusive of the private sky boxes, the ratio of men's facilities to women's facilities at San Diego Jack Murphy Stadium on March 22, 1995, was nearly two and a half men's facilities to every one woman's facility.

66. The first clause of the mission statement for San Diego Jack Murphy Stadium is "To provide a first class facility that is **safe**", however, Defendant, CITY OF SAN DIEGO, consciously chose to disregard their mission demonstrating a deliberate indifference to the medical needs of Plaintiff, and other patrons both male and female.

67. San Diego Jack Murphy Stadium has previously instituted policies released to the general public which they acknowledged are unenforceable in an attempt to mislead the public, further demonstrating their policy of deliberate

indifference. This is evidenced in the official minutes of the San Diego Authority Board of Governors of January 5, 1995, prior to the event which is the subject of this action.

68. San Diego Jack Murphy Stadium Authority, and other City officials, have also acknowledged that "the adequacy of women's facilities is a problem at all major events," and it is a problem they have been aware of prior to Plaintiffs's claim, however, they have not remedied the problem by installing new facilities or otherwise change the ratio at the Stadium. Furthermore, "sell out" events with over 54,000 people continue to be scheduled.

69. While the Equitable Restroom Act requiring 3.5 women's facilities to one men's facility has been adopted in other states of the Union, neither California nor the CITY OF SAN DIEGO, as a charter city has adopted such a standard.

70. As a direct and proximate result of Defendants' conduct, MR. GLASER has had his rights violated and suffered anger, humiliation, frustration, embarrassment, loss of earnings and loss of enjoyment of the concert, all in an amount according to proof at the time of trial.

71. The actions of defendants, and each of them, in knowingly allowing an unsafe, unsanitary, medically dangerous condition to exist, in a confined area, especially an area which they charged for, amounts to actions taken with deliberate indifference and a reckless and callous disregard for the rights of Plaintiff, thus justifying an award of punitive and exemplary

damages.

72. On May 11th, 1995 the CITY OF SAN DIEGO, formally denied the claim of MR. GLASER and provided him a right to sue letter. This action is therefore timely pursuant to California Government Code §945.6.

## VI

## CLAIMS

### FIRST CAUSE OF ACTION

**(Request for Declaratory and Injunctive Relief)**

73. Plaintiff hereby incorporates paragraphs 1 through 72 of this Complaint as if set forth fully herein.

74. Despite many circumstances of prior knowledge, and including this claim, Defendant, CITY OF SAN DIEGO, was and is aware of the dangerous condition creating a health and safety hazard on the premises of San Diego Jack Murphy Stadium any time a major event is scheduled.

75. Despite this knowledge and actual acknowledgement of this problem, by the Stadium manager, and acknowledgement by the Stadium manager that it would be corrected prior to subsequent events, Defendant, CITY OF SAN DIEGO, has continued to allow the situation to exist, and has allowed their concessionaire Defendant, SERVICE AMERICA to complicate the situation.

76. Defendant, SERVICE AMERICA, with full knowledge of the situation at San Diego Jack Murphy Stadium, continues to assist and facilitate the ongoing creation of an

unsafe and unsanitary environment. demonstrating a deliberate indifference to the medical needs of Plaintiff and other patrons.

77. Plaintiff has attempted to resolve this issue short of litigation at the request of Defendant, CITY OF SAN DIEGO, by the following acts: meeting with the City manager, meeting with the Stadium Authority. meeting with the facilities subcommittee of the Stadium Authority, addressing the City Council, preparing and proposing legislation to the City council. filing a letter of opposition to Certification of a Mitigated Negative Declaration.

78. All attempts at resolution have failed, and Defendant, CITY OF SAN DIEGO, has made their position abundantly clear that they will continue to engage in such hazardous, unsanitary and unsafe actions until enjoined and restrained by this Court.

Furthermore, the City Manager has stated "tell Bob to go ahead and sue."

79. The City Attorney, Elect, who has served as the mouthpiece to the media. still continues to focus on his opinions of Plaintiff rather than address the problem presented by this Complaint. Furthermore, he continues to acknowledge the existing problem and prior knowledge of the same, yet nothing is being done to correct it.

80. Without judicial intervention, Defendants' reckless and callous acts will continue to cause great irreparable injury not only to Plaintiff, but all future patrons of San Diego

Jack Murphy Stadium, particularly women. Plaintiff has no clear, adequate or complete remedy at law, and this suit for declaratory and injunctive relief is the only means to secure relief.

**SECOND CAUSE OF ACTION**

**(Deprivation of Civil Rights)**

81. Plaintiff hereby incorporates paragraphs 1 through 80 of this Complaint as if set forth fully herein.

82. By depriving Plaintiff of his constitutionally protected civil rights including but not limited to privacy and equal protection, and adequate medical attention, Defendants, and each of them, are in violation of 42 U.S.C. §1983.

**THIRD CAUSE OF ACTION**

**(Violation of Personal Security Interest)**

83. Plaintiff hereby incorporates paragraphs 1 through 82 of this Complaint as if set forth fully herein.

84. By allowing Plaintiff to be confronted with members of the opposite sex who were blatantly in violation of local law, who taunted him and caused great difficulty in performing a medically necessary bodily function, Defendants were deliberately indifferent to Plaintiff's right to personal security in violation of the Fourteenth Amendment of the United States Constitution.

**FOURTH CAUSE OF ACTION**

**(Invasion of Privacy)**

85. Plaintiff hereby incorporates paragraphs 1

through 84 of this Complaint as if set forth fully herein.

86. Plaintiff nad a reasonable expectation of privacy upon entering a designated single sex bathroom facility that once his penis was exposed during the urination process, no individuals of the opposite sex would be present to observe and taunt him.

87. By allowing such activity, by their ongoing failure to correct and remedy a known dangerous condition, Defendants, and each of them, deprived Plaintiff of his constitutionally guaranteed right to privacy of the Fourteenth Amendment.

## FIFTH CAUSE OF ACTION

### (Nuisance)

88. Plaintiff hereby incorporates paragraphs 1 through 87 of this Complaint as if set forth fully herein.

89. By creating an environment in which laws were not properly enforced, and facilities were not adequately provided and supervised, and in which the consumption of alcohol was available and encouraged, with full knowledge that the effects of alcohol required the frequent excretion of bodily fluids; and by placing Plaintiff in a confined space with inadequate facilities to relieve himself, due to the overflow of women during his urination, due to the inadequate men/women facilities ratio. Defendants, and each of them, created a nuisance on public property.

90. As a direct and proximate result of Defendants'

conduct, Plaintiff sustained damages as alleged herein.

**SIXTH CAUSE OF ACTION**

**(Premises Liability)**

91. Plaintiff hereby incorporates paragraphs 1 through 90 of this Complaint as if set forth fully herein.

92. Defendant, CITY OF SAN DIEGO, negligently owned, maintained, managed and operated SAN DIEGO JACK MURPHY STADIUM on March 22, 1995.

93. Furthermore, Defendant, CITY OF SAN DIEGO, willfully and maliciously failed to guard and warn against a dangerous condition being the inadequate ratio of men and women's restroom facilities.

94. Plaintiff, BOB GLASER, was a paying guest at San Diego Jack Murphy Stadium.

95. Defendant, CITY OF SAN DIEGO, who owned the public property, had actual notice of existence of the dangerous condition and sufficient time to correct it, however failed to do so.

96. As a direct and proximate result, Plaintiff sustained those damages alleged herein.

**SEVENTH CAUSE OF ACTION**

**(Negligence Per Se)**

97. Plaintiff hereby incorporates paragraphs 1 through 96 of this Complaint as if set forth fully herein.

98. Defendants, CITY OF SAN DIEGO, WJS III, INC., dba BILL SILVA PRESENTS, and STAFFPRO

SERVICES, INC., had a duty to enforce San Diego Municipal Code §59.0103(f).

99. By failing to enforce said code section, said Defendants breached their duty.

100. As a direct and proximate cause of Defendants' negligence, Plaintiff has been damaged as alleged herein.

**EIGHTH CAUSE OF ACTION**

**(Negligence)**

101. Plaintiff hereby incorporates paragraphs 1 through 100 of this Complaint as if set forth fully herein.

102. Defendants had a duty to provide a safe and sanitary environment for the patrons of the concert of March 22, 1995.

103. Said Defendants knew that nearly 54,000 patrons would be confined in an area with inadequate health facilities.

104. Defendant, SERVICE AMERICA INC., given their exclusive contract with Defendant, CITY OF SAN DIEGO, and the prior events at this venue, knew that the alcohol and other beverages they held out for sale to the patrons of San Diego Jack Murphy Stadium would necessitate patrons to use restroom facilities during the three-to-five-hour time frame that they were in the confined facility.

105. By not providing and supervising an adequate ratio of facilities, Defendants, and each of them, breached their duty.

106. As a direct and proximate cause of Defendants'

negligence, Plaintiff sustained damages as alleged herein.

**NINTH CAUSE OF ACTION**

**(Breach of Contract)**

107. Plaintiff hereby incorporates paragraphs 1 through 106 of this Complaint as if set forth fully herein.

108. The purchase of an admission ticket to the San Diego Jack Murphy Stadium for the purpose of attending the event on March 22, 1995, created a contract between Defendants and Plaintiff.

109. The terms of the contract were that for the consideration paid, specifically $50.00 per ticket, Defendants would provide an adequate, safe and secure facility to witness and enjoy an entertainment event.

110. Plaintiff has fully performed all obligations required from him under the contract, specifically the purchase of the admission ticket, and even notifying those agents charged with enforcement of the laws of the ongoing violations.

111. Defendants have failed to perform their conditions, and covenants in that the facility in which Plaintiff was confined, was neither safe nor secure in that he was unable to 1) enjoy the concert, and 2) perform his medically necessary bodily functions without unnecessary difficulty.

112. As a direct and proximate cause of Defendant's breach of contract, Plaintiff has sustained damages as alleged herein.

## VII

## PRAYER

WHEREFORE, Plaintiff prays for the following relief against Defendants, and each of them:

1) For an injunction prohibiting Defendants from engaging in such violations in the future;

2) For a declaration requiring Defendant CITY OF SAN DIEGO to change the facilities at San Diego Jack Murphy Stadium so as to provide for safe and sanitary conditions, including an equitable restroom ratio;

3) For the Court's retention of jurisdiction until such measures have been implemented to secure safe and sanitary conditions at San Diego Jack Murphy Stadium without any violation of local, state or federal laws;

4) For costs and reasonable attorney's fees pursuant to 42 U.S.C. §1988;

5) For punitive damages against Defendants in an amount according to proof;

6) For nominal compensatory damages in an amount according to proof;

7) For such other just and equitable relief as this Court deems proper.

## VIII
## JURY DEMAND

Plaintiff hereby demands trial by jury.

Respectively submitted,

DATED: February 5, 1996

LAW OFFICE OF JEFFREY S. SCHWARTZ

/s/ Jeffrey S. Schwartz
JEFFREY S. SCHWARTZ
Attorney for Plaintiff
**BOB GLASER**

## VERIFICATION

I, **BOB GLASER,** am the Plaintiff in this action. I have read the attached **FIRST AMENDED COMPLAINT FOR INJUNCTIVE RELIEF, DECLARATORY RELIEF, DAMAGES,** and know the contents thereof. The same is true of my own personal knowledge, except the matters that are stated on my information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on February 5, 1996, at San Diego, California.

/s/ Bobby Glaser
BOB GLASER